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EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

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1106

No. 3005

United States Circuit Court of Appeals

For the Ninth Circuit.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff in Error,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY and FOSTER,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No.

United States
Circuit Court of Appeals
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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiff and Appellant:

OLIN WELLBORN, Jr., Esq., 806 Security Building, Los Angeles, Cal.;

WM. M. SIMS, Esq., Suite 515 Kohl Building, San Francisco, Cal.;

MADISON MARINE, Esq., 904 International Bank Building, Los Angeles, Cal.

For Defendants and Appellees:

J. H. MERRIAM, Esq., Pasadena, Cal.;

HUNSAKER & BRITT, LEROY M. EDWARDS, JOSEPH L. LEWINSOHN, Esqs., 1132-1143 Title Insurance Building, Los Angeles, Cal.

Civil No. 299.

In the District Court of the United States in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY and FOSTER,

Defendants.

Citation on Appeal.

Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, state of California, on the 3rd day of May, 1917, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States, in and for the Southern District of California, Southern Division, from a final decree signed, filed and entered on the 19th day of September, 1916, in that certain suit being case No. Civil No. 299, wherein the Dangberg Land and Livestock Company is plaintiff and you are defendant and appellee, to show cause, if any there be, why the decree against said defendant, as in said order allowing the appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Oscar Trippet, United States judge for the District Court of the United States, in and for the Southern District of California, Southern Division, this 4th day of April, 1917, and of the independence of the United States 141st.

OSCAR A. TRIPPET,

United States District Court in and for the Southern District of California, Southern Division.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY and FOSTER,

Defendants.

Affidavit of Service.

John McK. Marble, being first duly sworn, on oath says: That he is and was, at the time of the service of the paper herein referred to, a citizen of the United States, over the age of twenty-one years, and not a party to the within entitled action; that he received the annexed citation on the 4th day of April, 1917, and on the same day duly served the same upon the defendant H. C. Day, by delivering to and leaving with J. H. Merriam, Joseph L. Lewinsohn, Hunsaker &

Britt and Leroy M. Edwards, the attorneys of record of said defendant, in the city of Los Angeles, county of Los Angeles, state of California, a full, true and correct copy of said citation.

JOHN McK. MARBLE.

Subscribed and sworn to before me this 13th day of April, 1917.

(Seal) ROBERT A. ETIE,

Notary Public in and for said County of Los Angeles, State of California.

[Endorsed]: Civil No. 299. In the District Court of the United States, in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants. Citation on appeal. Received a copy of the within citation this 4th day of April, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt and Le Roy M. Edwards, attys. for deft. Day. Filed Apr. 19, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, California, attorney for plaintiff.

Writ of Error.

Civil 299.

United States of America—ss.

The President of the United States, to the Honorable Oscar A. Trippet, judge of the United States District Court, Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, which is in the said District Court, before you, between H. F. Dangberg Land & Livestock Company, plaintiff in error, and H. C. Day and S. A. Foster, defendants, a manifest error hath happened, to the damage of said Dangberg Land and Livestock Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings thereof, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the state of California, where said court is sitting, on or before the 4th day of May, 1917, in the said Circuit Court of Appeals, to be then and there held, and that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 26th day of April, 1917.

(Seal) WM. M. VAN DYKE,
Clerk of the United States District Court for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

The above writ of error is hereby allowed this 26th day of April, 1917.

TRIPPET,
Judge.

I hereby certify that a copy of the within writ of error was on the 26th day of April, 1917, lodged in the clerk's office of the United States District Court for the Southern District of California, Southern Division, for said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: 299 Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiffs, vs. H. C. Day and S. A. Foster, co-partners doing business under the firm name and style of Day and Foster, defendants. Writ of error. Filed Apr. 26, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Olin Wellborn, Jr., and Stephen Monteleone, attorneys for plaintiff.

In the District Court of the United States, for the Southern District of the State of California, Southern Division.

H. F. DANGBERG LAND and LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Complaint.

To the Honorable, the Judge of the District Court of the United States, for the Southern District of the state of California:

H. F. Dangberg Land & Livestock Company, as hereinbefore stated, brings this, its complaint, against H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants:

And your plaintiff complains and alleges as follows:

I.

That plaintiff is and for more than ten years hence hitherto has been a corporation duly created and organized and existing under and by virtue of the laws of the state of Nevada and is a citizen and resident of the state of Nevada.

II.

That defendant H. C. Day is a citizen and resident of the city of Pasadena, county of Los Angeles, state of California.

III.

That defendant S. A. Foster is a citizen and resident of the town of Duncan, county of Greenlee, state of Arizona.

IV.

That defendants H. C. Day and S. A. Foster are co-partners, doing business under the firm name and style of Day & Foster.

V.

That Highland Cattle Company is, and for more than six months hence hitherto has been a corporation

duly created and organized and existing under and by virtue of the laws of the state of Nevada and is a citizen and resident of the state of Nevada.

VI.

That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of the Highland Cattle Company. That on or about the 17th day of March, 1913, at the town of Lordsburg, state of New Mexico, the said J. C. Dodson informed the secretary of said Highland Cattle Company that he, the said J. C. Dodson, could purchase of defendants all of defendants' cattle, horses, lands and cattle business equipment, situated and located in the states of Arizona and New Mexico, the cattle to count at least nine thousand head with young calves thrown in and not counted, for the sum of two hundred and fifty thousand dollars ($250,000).

That said secretary of said Highland Cattle Company informed said J. C. Dodson that if defendants would guarantee to deliver nine thousand head of cattle, with young calves thrown in and not counted, the said secretary of said Highland Cattle Company would endeavor to have it purchase the cattle, horses, lands and cattle business equipment of defendants, situated in the states of Arizona and New Mexico, for the sum of two hundred and fifty thousand dollars ($250,000).

VII.

That on or about the 30th day of March, 1913, the said J. C. Dodson met the president and secretary of said Highland Cattle Company at the city of Reno,

state of Nevada, and delivered to them a draft of agreement, as follows, viz.:

"AGREEMENT.

"This agreement made this 25th day of March, in the year of our Lord one thousand nine hundred thirteen, between Day & Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of Day & Foster, party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part, witnesseth:

"That for and in consideration of the sum of twenty thousand ($20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto said party of the second part all cattle, horses, real estate and farming implements mentioned in the deed hereto attached, and the said party of the secoid part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand ($230,000) dollars, lawful money of the United States, said sum to be paid on or before the 20th day of June, 1913.

"The said party of the first part guarantees there to be nine thousand (9,000) head of cattle, calves from October, 1912, not to be counted. The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned and said party of

the first part guaran-""tees that all property mentioned in said papers is free from all incumbrances whatsoever kind and that they have a good and perfect title to the same. The deed hereto attached covers one thousand (1,000) acres of land, more or less. The bill of sale hereto attached covers nine thousand (9,000) head of cattle and ninety head of horses. The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

"In witness whereof the said parties of this agreement have hereunto set their hands and seals March 25th, 1913.

. . . . . .

. . . . . .

. . . . . ."

That at the time said J. C. Dodson delivered to said president and secretary of said Highland Cattle Company said draft of agreement, he stated to them that the said defendants had executed a copy thereof and that he had signed the same as manager of said Highland Cattle Company; that the said signed instrument, together with a deed of defendants' lands covering 1000 acres of land more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, thrown in and not counted, 90 head of horses, farming implements and cattle business equipment, all duly made and executed by the defendants and attached to said signed agreement, had been deposited in escrow in the Bank of Duncan, in the town of Duncan, state of Arizona, in accordance with the terms of said draft of agreement above set forth.

VIII.

That on the 31st day of March, 1913, said Highland Cattle Company, at the town of Minden, state of Nevada, received from said J. C. Dodson, through the United States mail, an instrument in the words and figures following:

"HIGHLAND CATTLE CO.

Minden, Nev.

March 25, 1913.

Bought of Day and Foster the following:

No. Head	Live Stock	Weight	Price	Amount

All their cattle, horses and land in Arizona and N. M. amt. of this check 20,000.00 there are to be 9000 cattle above October calves about 90 horses and 1000 acres or more deed land all leases etc. Above live stock to be delivered f. o. b. cars—191 and hereby acknowledge receipt of $20,000.00.

H. C. DODSON, Buyer.

DAY & FOSTER, Seller."

IX.

That afterwards, on the said 31st day of March, 1913, the Farmers Bank of Carson Valley, at the town of Minden, state of Nevada, presented to said Highland Cattle Company for payment the following draft, viz.:

"Highland Cattle Company. 8048 No. 112

March 25, 1913.

Pay to the order of Day and Foster.....$20,000.00

twenty thousand .....no-100 dollars

J. C. DODSON,

Buyer.

Dealers and growers of live stock, Minden, Nevada.

Please forward Farmers Bank, Carson Valley, Carson, Nevada.

Farmers Bank of Carson Valley, Inc.

Paid Mar. 31, 1913.

Minden.....Nevada."

Endorsed: "Day & Foster. Pay to the order of any bank or banker all prior endorsements guaranteed. The Bank of Duncan 91-64 Duncan Ariz. 91-64. B. R. Lanneau, cashier. For collection. Pay to the order of any bank or banker Mar. 28, 1913. The Crocker National Bank of San Francisco." (The word "'Paid" perforated through draft.)

X.

That at the time said draft of agreement hereinbefore described in subdivision VII hereof was delivered to the president and secretary of said Highland Cattle Company as aforesaid, they believed it to be a true copy of an original agreement deposited in escrow with the said Bank of Duncan, and also believed to be true the statements made to them by said J. C. Dodson that an original copy of said draft of agreement had been executed by defendants and that a deed or deeds covering 1000 acres of land, more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, not to be counted, and 90 head of horses, and farming implements, had been made, executed and delivered by defendants to said Bank of Duncan, in accordance with the terms of said draft of agreement; that on the 31st day of March, 1913, said president and secretary of said Highland Cattle Company believed to have been executed in the words and

figures as set forth in subdivision VIII hereof, the instrument received by said Highland Cattle Company and signed by defendants.

That, believing to be true said statements of said J. C. Dodson, and believing a draft of agreement, a copy of which is set forth in subdivision VII hereof had been executed by said defendants, and believing said instrument, a copy of which is set forth in subdivision VIII hereof had been executed by defendants in the words and figures as it was received by it, said Highland Cattle Company honored and paid the aforesaid draft described in subdivision IX hereof, by paying to the said Farmers Bank of Carson Valley for defendants, at said town of Minden, the sum of twenty thousand dollars.

XI.

That on the 24th day of May, 1913, at the town of Lordsburg, state of New Mexico, the said defendant S. A. Foster admitted to the president and secretary of said Highland Cattle Company that the instrument, a copy whereof is set forth in subdivision VIII hereof, was true and correct and had been executed by said Day and Foster, co-partners, by him as one of said partners; also, that the draft of agreement described in subdivision VII hereof he thought was practically a true copy of the original agreement deposited with the said Bank of Duncan and executed by defendants and by said J. C. Dodson as purported manager of said Highland Cattle Company. Thereupon said president and secretary of said Highland Cattle Company notified said S. A. Foster that the said Highland Cattle Company was willing and ready to receive and

accept said property described in said draft of agreement set forth in subdivision VII hereof, and to pay defendants the balance of the purchase price therefor.

XII.

That on or about 4 o'clock p. m. of the 26th day of May, 1913, at said town of Lordsburg, state of New Mexico, said president and secretary of said Highland Cattle Company by and from certain acts done and statements made by both said J. C. Dodson and the said defendant S. A. Foster, became suspicious that the draft of agreement described in subdivision VII hereof was not a true and correct copy of the purported signed copy held in escrow by the said Bank of Duncan, as aforesaid, and requested the said defendant S. A. Foster to forthwith accompany one of the officers of said Highland Cattle Company to the said town of Duncan and examine all said papers and instruments held in escrow by the said Bank of Duncan relating to the transaction, and he consented to start at once with the secretary of said Highland Cattle Company; that notwithstanding the secretary of said Highland Company immediately had an automobile in readiness to make said trip and notified said defendant, S. A. Foster, he, the said defendant S. A. Foster, delayed starting from said town of Lordsburg until about 6 o'clock p. m. of said day, and between the hours of 4 o'clock p. m. and 6 o'clock p. m. of said day, had many conferences with said J. C. Dodson; that finally, and after much urging, the said S. A. Foster and the secretary of said Highland Cattle Company made said trip to saod town of Duncan, and were shown by the manager of said Bank of Duncan

the signed instrument in the words and figures following:

"This agreement, made this twenty-fifth day of March in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, the party of the second part, witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 ($20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all" "cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached. And the said party of the second part agrees to pay the said party of the first part the further sum of two hundred and thirty thousand & 00/100 ($230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned. And the said party of the first part hereby guarantees that all property mentioned in said papers

is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less.

The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

(Signed) DAY & FOSTER,
S. A. FOSTER.
(Signed) J. C. DODSON,
Manager Highland Cattle Co."

And also, at the same time and place, were shown a bill of sale executed by defendants by S. A. Foster, agent, purporting to sell to the said Highland Cattle Company all cattle branded with certain brands and marks, also certain farming implements; that said instrument did not state or specify the number of cattle sold; that immediately after said last named instruments had been examined and read by the secretary of said Highland Cattle Company, the said defendant S. A. Foster stated to said secretary that the following words and figures set forth in that certain instrument described in subdivision VIII hereof, were false and fraudulent, viz.: "there are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land all leases, etc," and had been inserted

above the signature of defendants after it had been executed by them; and at the same time and place, said defendant S. A. Foster stated to said secretary that defendants did not own or possess on the 25th day of March, 1913, or at any time since said day, on their cattle ranges in Arizona and New Mexico, 9000 head of cattle, or any number exceeding about 7000 head, and that defendants could not deliver to said Highland Cattle Company a greater number of cattle, including young calves, than 7000 head.

That thereupon, the secretary of said Highland Cattle Company immediately stated to said defendant S. A. Foster that the said Highland Cattle Company repudiated and disaffirmed said purported contract above described in this subdivision, and that said Highland Cattle Company demanded the repayment to it of the aforesaid sum of twenty thousand dollars ($20,000) paid to defendants as hereinbefore alleged.

XIII.

That thereafter and on the 7th day of June, 1913, said Highland Cattle Company in writing demanded of defendants the repayment of it of said sum of twenty thousand dollars.

XIV.

That said J. C. Dodson had no power or authority expressed or implied, to bind said Highland Cattle Company to any agreement for the purchase of said lands, cattle or other property of said defendants.

That said Highland Cattle Company never accepted nor ratified the instrument set forth in subdivision XII hereof.

XV.

That heretofore, and on the 16th day of January, 1914, the said Highland Cattle Company for value, sold, assigned and transferred its said claim or account against defendants in the sum of twenty thousand dollars to said H. F. Dangberg Land and Livestock Company, said plaintiff herein, and it is now the owner and holder thereof.

XVI.

That no part of said sum of twenty thousand dollars has been paid by said defendants or either of them, and the whole amount thereof, with interest from the 31st day of March, 1913, at the rate of seven per cent per annum, is now due, owing and unpaid from said defendants and each of them to this plaintiff.

Wherefore, plaintiff prays judgment against said defendants and each of them for the sum of twenty thousand dollars lawful money of the United States, with interest thereon from the 31st day of March, 1913, at the rate of seven per cent per annum and for such other and further relief in the premises as to the court shall seem just and equitable.

MADISON MARINE,
WM. M. SIMS,
Attorneys for Plaintiff.

Dated, January 16th, 1914.

State of Nevada, County of Douglass—ss.

Personally appeared before the undersigned authority, H. F. Dangberg, known to the undersigned to be the secretary of the complainant, the H. F.

Dangberg Land and Livestock Company, a corporation, who being duly sworn as to the truth of the allegations made in the above complaint, says that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes them to be true; that he makes this verification for and in behalf of said complainant corporation.

H. F. DANGBERG.

Subscribed and sworn to before me this 16th day of January, A. D. 1914.

(Seal) J. A. CARDINAL,

Notary Public in and for the County of Douglass, State of Nevada.

[Endorsed]: Original. No. 299 Civ. Dep't..... In the District Court of the United States for the Southern District of the state of California, Southern Division. H. F. Dangberg Land and Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, etc., defendants. Complaint. Filed Jan. 23, 1914. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. William M. Sims, attorney at law. Suite 515 Kohl Building, attorney for plaintiff.

United States of America, District Court of the United States, Southern District of California, Southern Division.

H. F. DANGBERG LAND AND LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, etc.,

Defendants.

Summons.

Action brought in the said District Court, and the complaint filed in the office of the clerk of said District Court, in the city of Los Angeles, county of Los Angeles, state of California.

The President of the United States of America, Greeting:

To H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Los Angeles, county of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

And you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any money or damages demanded in the complaint as arising from contract or will apply to the court for any further relief demanded in the complaint.

Witness, the Honorable Olin Wellborn, judge of the District Court of the United States, in and for the Southern District of California, this 23rd day of January, in the year of our Lord one thousand nine

hundred and fourteen and of our Independence the one hundred and thirty-eighth.

(Seal) WM. M. VAN DYKE,
Clerk.
By LESLIE S. COLYER,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I hereby certify, that I received the within writ on the 27th day of January, 1914, and personally served the same on the 2 day of February, 1914, by delivering to and leaving with H. C. Day, said defendant named therein, personally, at the county of Los Angeles city, in said district, a cretified copy thereof, together with a copy of the complaint, certified to by Wm. M. Van Dyke, attached thereto.

LEO V. YOUNGWORTH,
U. S. Marshal.
By E. DINGLE,
Deputy.

Los Angeles, February 2, 1914.

[Endorsed]: Marshal's Civil Docket No. 2329. No. 299 Civil. U. S. District Court, Southern District of California, Southern Division. H. F. Dangberg Land and Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, etc., defendants. Summons. Filed Feb. 2, 1914. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Madison Marine, Esq., and Wm. M. Sims, plaintiff's attorney. 2 Com. L. R. B. 284.

No. 299. Civil.

In the District Court of the United States in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of Day & Foster,

Defendants.

Demurrer of Defendant H. C. Day to Complaint.

Now comes defendant, H. C. Day, and demurs to the complaint of plaintiff in the above entitled action, on the following grounds:

1. That said complaint does not set forth facts sufficient to constitute a cause of action against this defendant.

2. That said complaint is uncertain in the following particulars:

(a) It cannot be ascertained therefrom whether or not plaintiff's assignor was in existence as a corporation at the time of the alleged transaction with the defendants, upon which the action is based.

(b) It cannot be ascertained therefrom what was the nature of the employment of J. C. Dodson by plaintiff's assignor as alleged in paragraph VI of plaintiff's complaint.

(c) It cannot be ascertained therefrom what was the extent of the power or authority of J. C. Dodson to act for and on behalf of plaintiff's assignor, in

the transactions upon which the complaint is based.

(d) It cannot be ascertained therefrom what were the acts or statements or the nature of the acts or statements which are alleged in paragraph XII to have caused suspicion, nor what connection, if any, the defendants or either of them had therewith.

(e) It cannot be ascertained therefrom what action, if any, was taken by plaintiff's assignor regarding the purchase by it of defendant's cattle and land, as set forth in said complaint, either before or after the date of the alleged sale and purchase, as set forth in paragraph XII of said complaint.

3. That said complaint is ambiguous in the several particulars in which it is specified in paragraph 2 hereof that the same is uncertain.

4. That said complaint is unintelligible in the several particulars in which it is specified in paragraph 2 hereof that the same is uncertain.

J. H. MERRIAM,
Attorney for Defendant H. C. Day.

[Endorsed]: Original. No. 299. Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners doing business under the firm name and style of Day & Foster, defendants. Demurrer of defendant, H. C. Day, to complaint. Service by copy acknowledged on Feb. 28, 1914. Wm. M. Sims, Madison Marine, attorneys for plff. Filed Feb. 28, 1914. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy. J. H.

Merriam, Pasadena, California, attorney for defendant Day.

Copy Minute Order.

At a stated term, to-wit: the January Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and fifteen.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.,* defendants. No. 229 Civil S. D.

This cause coming on this day to be heard on the demurrer of defendant H. C. Day to plaintiff's complaint; Wm. M. Sims, Esq., appearing as counsel for plaintiff; Fen Goodman, Esq., appearing as counsel for defendants; and said demurrer having been argued by counsel for the respective parties, and submitted to the court, it is by the court ordered that the general demurrer be, and the same hereby is overruled, and that the special demurrer to the complaint be, and the same hereby is sustained, with leave to plaintiff to amend within ten (10) days, if it shall be so advised, plaintiff, by its said counsel, waiving notice of the sustaining of said demurrer.

[Endorsed]: No. 299 Civil. United States District

Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company vs. H. C. Day *et al.* Copy minute order. Filed Sep. 22, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk.

In the District Court of the United States, for the Southern District of the State of California.

H. F. DANGBERG LAND AND LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY & FOSTER,

Defendants.

Amended Complaint.

To the Honorable, the Judge of the District Court of the United States, for the Southern District of the State of California:

By leave of court first had and obtained the H. F. Dangberg Land and Livestock Company, as hereinbefore stated, brings this, its amended complaint against H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants:

And your plaintiff complains and alleges as follows:

I.

That plaintiff is and for more than ten years hence hitherto has been a corporation duly created and organized and existing under and by virtue of the laws

of the state of Nevada and is a citizen and resident of the state of Nevada.

II.

That defendant H. C. Day is a citizen and resident of the city of Pasadena, county of Los Angeles, state of California.

III.

That defendant S. A. Foster is a citizen and resident of the town of Duncan, county of Greenlee, state of Arizona.

IV.

That defendants H. C. Day and S. A. Foster are copartners, doing business under the firm name and style of Day and Foster.

V.

That Highland Cattle Company ever since the 13th day of January, 1913, has been and now is a corporation duly created and organized and existing under and by virtue of the laws of the state of Nevada, and, during all the times herein mentioned was, and now is a citizen and resident of the state of Nevada.

VI.

That at all the times herein mentioned the said Highland Cattle Company was engaged in the business of cattle raising in the state of New Mexico. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of the said Highland Cattle Company as manager of its cattle business in the state of New Mexico; that the only duties and powers of said J. C. Dodson, as such manager were to employ laborers for said Highland Cattle Company, necessary

to carry on its said cattle business and to discharge any of said laborers in his discretion, and to manage and direct said employees in the work necessary to conduct and carry on said cattle business. That on or about the 17th day of March, 1913, at the town of Lordsburg, state of New Mexico, the said J. C. Dodson informed the secretary of said Highland Cattle Company that he, the said J. C. Dodson, could purchase of defendants all of defendants' cattle, horses, lands and cattle business equipment, situated and located in the states of Arizona and New Mexico, the cattle to count at least nine thousand head with young calves thrown in and not counted, for the sum of two hundred and fifty thousand dollars ($250,000).

That said secretary of said Highland Cattle Company informed said J. C. Dodson that if defendants would guarantee to deliver nine thousand head of cattle, with young calves thrown in and not counted, the said secretary of said Highland Cattle Company would endeavor to have it purchase the cattle, horses, lands and cattle business equipment of defendants, situated in the states of Arizona and New Mexico for the sum of two hundred and fifty thousand dollars ($250,000).

VII.

That on or about the 30th day of March, 1913, the said J. C. Dodson met the president and secretary of said Highland Cattle Company at the city of Reno, state of Nevada, and delivered to them a draft of agreement, as follows, viz.:

"AGREEMENT.

"This agreement, made this 25th day of March in the year of our Lord one thousand nine hundred thirteen, between Day & Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of Day and Foster, party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part, witnesseth:

"That for and in consideration of the sum of twenty thousand ($20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto said party of the second part, all cattle, horses, real estate and farming implements mentioned in the deed hereto attached, and the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand ($230,000) dollars, lawful money of the United States, said sum to be paid on or before the 20th day of June, 1913.

"The said party of the first part guarantees there to be nine thousand (9,000) head of cattle, calves from October, 1912, not to be counted. The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned and said party of the first part guarantees that all property mentioned in said papers is free from all incumbrances whatso-

ever kind and that they have a good and perfect title to the same. The deed hereto attached covers one thousand (1,000) acres of land, more or less. The bill of sale hereto attached covers nine thousand (9,000) head of cattle and ninety head of horses. The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

"In witness whereof the said parties of this agreement have hereunto set their hands and seals March 25th, 1913.

. . . . . .

. . . . . .

. . . . . ."

That at the time said J. C. Dodson delivered to said president and secretary of said Highland Cattle Company said draft of agreement, he stated to them that the said defendants had executed a copy thereof and that he had signed the same as manager of said Highland Cattle Company; that the said signed instrument, together with a deed of defendants' lands covering 1000 acres of land, more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, thrown in and not counted, 90 head of horses, farming implements and cattle business equipment, all duly made and executed by the defendants and attached to said signed agreement, had been deposited in escrow in the Bank of Duncan, in the town of Duncan, state of Arizona, in accordance with the terms of said draft of agreement above set forth.

VIII.

That on the 31st day of March, 1913, said Highland Cattle Company, at the town of Minden, state of Nevada, received from said J. C. Dodson, through the United States mail, an instrument in the words and figures following:

"Highland Cattle Co.

Minden, Nev.
March 25, 1913.

Bought of Day and Foster the following:

No. Head.	Livestock.	Weight.	Price.	Amount.
	All their cattle, horses and land in Arizona and N. M., amt. of this check,			20,000.00

There are to be 9000 cattle, above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc. Above livestock to be delivered f. o. b. cars .....191 and hereby acknowledge receipt of $20,000.00.

H. C. DODSON, Buyer.

DAY & FOSTER, Seller."

IX.

That afterwards, on the said 31st day of March, 1913, the Farmers Bank of Carson Valley, at the town of Minden, state of Nevada, presented to said Highland Cattle Company for payment the following draft, viz.:

"Highland Cattle Company. 8048 No. 112

March 25, 1913.

Pay to the order of Day and Foster..... $20,000.00
Twenty thousand .....no-100 dollars.

J. C. DODSON,
Buyer.

Dealers and growers of livestock, Minden, Nevada.

Please forward Farmers Bank, Carson Valley, Carson, Nevada. Farmers Bank of Carson Valley, Inc. Paid Mar. 31, 1913.

Minden.....Nevada."

Endorsed: "Day & Foster. Pay to the order of any bank or banker, all prior endorsements guaranteed. The Bank of Duncan, 91-64. Duncan, Ariz. 91-64. B. R. Lanneau, cashier. For collection. Pay to the order of any bank or banker. Mar. 28, 1913. The Crocker National Bank of San Francisco." (The word "Paid" perforated through draft.)

X.

That at the time said draft of agreement hereinbefore described in subdivision VII hereof was delivered to the president and secretary of said Highland Cattle Company as aforesaid, they believed it to be a true copy of an original agreement deposited in escrow with the said Bank of Duncan, and also believed to be true the statements made to them by said J. C. Dodson that an original copy of said draft of agreement had been executed by defendants and that a deed or deeds covering 1000 acres of land, more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, not to be counted, and 90 head of horses, and farming implements, had been made, executed and delivered by defendants to said Bank of Duncan, in accordance with the terms of said

draft of agreement; that on the 31st day of March, 1913, said president and secretary of said Highland Cattle Company believed to have been executed in the words and figures as set forth in subdivision VIII hereof, the instrument received by said Highland Cattle Company and signed by defendants.

That, believeing to be true said statements of said J. C. Dodson, and believing a draft of agreement, a copy of which is set forth in subdivision VII hereof had been executed by said defendants, and believing said instrument, a copy of which is set forth in subdivision VIII hereof had been executed by defendants in the words and figures as it was received by it, said Highland Cattle Company honored and paid the aforesaid draft described in subdivision IX hereof, by paying to the said Farmers Bank of Carson Valley for defendants, at said town of Minden, the sum of twenty thousand dollars.

XI.

That on the 24th day of May, 1913, at the town of Lordsburg, state of New Mexico, the said defendant S. A. Foster admitted to the president and secretary of said Highland Cattle Company that the instrument, a copy whereof is set forth in subdivision VIII hereof was true and correct and had been executed by said Day and Foster, co-partners, by him as one of said partners; also, that the draft of agreement described in subdivision VII hereof he thought was practically a true copy of the original agreement deposited with the said Bank of Duncan and executed by defendants and by said J. C. Dodson as purported manager of said Highland Cattle Company. There-

upon said president and secretary of said Highland Cattle Company notified said S. A. Foster that the said Highland Cattle Company was willing and ready to receive and accept said property described in said draft of agreement set forth in subdivision VII hereof, and to pay defendants the balance of the purchase price therefor.

XII.

That on or about 4 o'clock p. m. of the 26th day of May, 1913, at said town of Lordsburg, state of New Mexico, said president and secretary of said Highland Cattle Company requested the said defendant S. A. Foster to forthwith accompany one of the officers of said Highland Cattle Company to the said town of Duncan and examine all said papers and instruments held in escrow by the said Bank of Duncan relating to the transaction, and he consented to start at once with the secretary of said Highland Cattle Company; that notwithstanding the secretary of said Highland Cattle Company immediately had an automobile in readiness to make said trip and notified said defendant, S. A. Foster, he, the said defendant S. A. Foster, delayed starting from said town of Lordsburg until about 6 o'clock p. m. of said day, and between the hours of 4 o'clock p. m. and 6 o'clock p. m. of said day, had many conferences with said J. C. Dodson; that finally, and after much urging, the said S. A. Foster and the secretary of said Highland Cattle Company made said trip to said town of Duncan, and were shown by the manager of said Bank of Duncan the signed instrument in the words and figures following:

"This agreement, made this twenty-fifth day of March in the year of our Lord one thousand nine hundred and thirteen between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, the party of the second part, witnesseth:

That for and in consideration of the sum of twenty thousand and 00/100 ($20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay the said party of the first part the further sum of two hundred and thirty thousand & 00/100 ($230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned. And the said party of the first part hereby guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less.

The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

(Signed) DAY & FOSTER,
S. A. Foster.
(Signed) J. C. DODSON,
Manager Highland Cattle Co."

And also, at the same time and place, were shown a bill of sale executed by defendants by S. A. Foster, agent, purporting to sell to the said Highland Cattle Company all cattle branded with certain brands and marks, also certain farming implements; that said instrument did not state or specify the number of cattle sold; that immediately after said last named instruments had been examined and read by the secretary of said Highland Cattle Company, the said defendant S. A. Foster stated to said secretary that the following words and figures set forth in that certain instrument described in subdivision VIII hereof, were false and fraudulent, viz.: "there are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc.," and had been inserted above the signature of defendants after it had

been executed by them; and at the same time and place, said defendant S. A. Foster stated to said secretary that defendants did not own or possess on the 25th day of March, 1913, or at any time since said day, on their cattle ranges in Arizona and New Mexico, 9000 head of cattle, or any number exceeding about 7000 head, and that defendants could not deliver to said Highland Cattle Company a greater number of cattle, including young calves, than 7000 head.

That thereupon, the secretary of said Highland Cattle Company immediately stated to said defendant S. A. Foster that the said Highland Cattle Company repudiated and disaffirmed said purported contract above described in this subdivision, and that said Highland Cattle Company demanded the repayment to it of the aforesaid sum of twenty thousand dollars ($20,000) paid to defendants as hereinbefore alleged.

XIII.

That thereafter and on the 7th day of June, 1913, said Highland Cattle Company in writing demanded of defendants the repayment to it of said sum of twenty thousand dollars.

XIV.

That said J. C. Dodson had no power or authority expressed or implied, to bind said Highland Cattle Company to any agreement for the purchase of said lands, cattle or other property of said defendants.

That said Highland Cattle Company never accepted nor ratified the instrument set forth in subdivision XII hereof.

XV.

That heretofore, and on the 16th day of January, 1914, the said Highland Cattle Company for value, sold, assigned and transferred its said claim or account against defendants in the sum of twenty thousand dollars to said H. F. Dangberg Land and Livestock Company, said plaintiff herein, and it is now the owner and holder thereof.

XVI.

That no part of said sum of twenty thousand dollars has been paid by said defendants or either of them, and the whole amount thereof, with interest from the 31st day of March, 1913, at the rate of seven per cent per annum, is now due, owing and unpaid from said defendants and each of them to this plaintiff.

Wherefore, plaintiff prays judgment against said defendants and each of them for the sum of twenty thousand dollars lawful money of the United States, with interest thereon from the 31st day of March, 1913, at the rate of seven per cent per annum and for such other and further relief in the premises as to the court shall seem just and equitable.

MADISON MARINE,
WM. M. SIMS,
Attorneys for Plaintiff.

Dated: February 3, 1915.

State of California, City and County of San Francisco—ss.

Personally appeared before the undersigned authority, Wm. M. Sims, known to the undersigned to be

one of the attorneys of the complainant, the H. F. Dangberg Land and Livestock Company, a corporation, who being duly sworn as to the truth of the allegations made in the amended complaint, says that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true; that he believes this verification for and in behalf of said complainant corporation. That the reason one of the officers of said corporation does not make this affidavit for and in behalf of said complainant is that all of said officers are absent from the said city and county of San Francisco where affiant has his office; that the facts set forth in said amended complaint are within the knowledge of affiant.

WM. M. SIMS.

Subscribed and sworn to before me this 3rd day of February, A. D. 1915.

(Seal) W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Original. No. 299. Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners doing business under the firm name and style of Day & Foster, defendants. Amended complaint. Received copy within amended complaint this 4th day February. J. H. Merriam & Hunsaker & Britt. Filed Feb. 4, 1915.

Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. William M. Sims, Crocker Bldg., San Francisco, Cal., attorney for plaintiff.

No. 299. Civil.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY & FOSTER,

Defendants.

Demurrer of Defendant H. C. Day to Amended Complaint.

Now comes defendant H. C. Day and demurs to the amended complaint in the above entitled action on the following grounds:

1. That the court has not jurisdiction of the cause of action stated in said complaint.

2. That the court has not jurisdiction to try said action against this defendant in the absence of the defendant S. A. Foster.

3. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

4. That said complaint is uncertain in the following particulars:

(a) It cannot be ascertained therefrom whether or not plaintiff's assignor was in existence as a corporation at the time of the alleged transaction with the defendants upon which the action is based.

(b) It cannot be ascertained therefrom what was the nature of the employment of J. C. Dodson by plaintiff's assignor as alleged in paragraph VI of plaintiff's complaint.

(c) It cannot be ascertained therefrom what was the extent of the power or authority of J. C. Dodson to act for and on behalf of plaintiff's assignor in the transactions upon which the complaint is based.

(d) It cannot be ascertained therefrom what were the acts or statements, or the nature of the acts or statements which are alleged in paragraph XII to have caused suspicion, nor what connection the defendants, or either of them, had therewith.

(e) It cannot be ascertained therefrom what action, if any, was taken by plaintiff's assignor regarding the purchase of defendants' cattle and land as set forth in said complaint, either before or after the date of the alleged sale and purchase, as set forth in paragraph XII of said complaint.

5. That said complaint is ambiguous in the several particulars in which it is specified in paragraph 4 hereof that the same is uncertain.

6. That said complaint is unintelligible in the several particulars in which it is specified in paragraph 4 hereof that the same is uncertain.

J. H. MERRIAM and
HUNSAKER & BRITT,
Attorneys for Defendant H. C. Day.

[Endorsed]: Original. No. 299. Civil. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day et al., defendants. Demurrer of defendant H. C. Day to amended complaint. Service of the within demurrer is hereby admitted this 15th day of February, 1915. Madison Marine, P., attorney for plaintiff. Filed Feb. 15, 1915. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneysh for deft. H. C. Day.

Copy Minute Order.

At a stated term, to-wit: the July Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Saturday, the twentieth day of November, in the year of our Lord one thousand nine hundred and fifteen.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, defendants. No. 299 Civil S. D.

This cause having heretofore been submitted to the court for its consideration and decision on the demurrer of defendant H. C. Day to plaintiff's amended complaint; the court having duly considered the same, and being fully advised in the premises, now orally

announces its conclusions thereon, and it is ordered that said demurrer of defendant H. C. Day to plaintiff's amended complaint be, and the same hereby is overruled, and defendants assigned to answer said amended complaint within ten (10) days.

[Endorsed]: No. 299 Civil. United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company vs. H. C. Day *et al.* Copy minute order. Filed Sep. 22, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk.

In the District Court of the United States, for the Southern District of California, Southern Division, Ninth Circuit.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY & FOSTER,

Answer of Defendant H. C. Day.

Comes now H. C. Day, one of the defendants named in the above-entitled action, and, without waiving his general and special demurrer to the amended complaint in the above-entitled action and his objections to the jurisdiction of the court, but expressly reserving the right to the full benefit thereof at any time during the progress of this action, and protesting against being further required to answer the amended

complaint, severing himself from his co-defendant herein, for separate answer to said complaint, admits, denies and alleges as follows:

1. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph one of said complaint, and basing his answer upon said ground, he denies the same.

2. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph five of said complaint, and basing his answer upon said ground, denies the same.

3. Admits that at all times mentioned in said complaint the Highland Cattle Company was engaged in the business of cattle raising in the state of New Mexico, and alleges that at all such times it was also engaged in the business of purchasing lands and ranches and buying and selling cattle. Admits that for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of said Highland Cattle Company as manager of its cattle business in the state of New Mexico, and he is informed and believes, and therefore alleges, that during such time said Dodson was a director of the said Highland Cattle Company and vice-president and manager thereof and the owner of approximately one-third of the capital stock thereof, and with one H. F. Dangberg and one F. E. Humphreys had domination and control over said Highland Cattle Company, and said Dodson was the duly authorized manager and resident agent of said corporation for the states of New Mexico and Arizona, with residence fixed at Lordsburg, New Mexico, and was

the duly authorized agent of said company to purchase lands and ranches and to buy and sell cattle in said state of New Mexico and in the state of Arizona, and for said corporation to receive service of process. Denies that the only duties and powers, or the only duties or powers of said J. C. Dodson as such manager, or otherwise, were to employ laborers for said Highland Cattle Company necessary to carry on its said cattle business, or otherwise, or to discharge any of such laborers in his discretion, or to manage and direct said employees in the work necessary to conduct and carry on said cattle business, or otherwise. Alleges that he has no information or belief sufficient to enable him to answer any of the allegations contained in that portion of paragraph six of plaintiff's complaint, beginning with the word "that" in line 27 of page 2 thereof, to and including the figures $250,000" in line 12 of page 3 thereof, and basing his answer upon said ground, denies the same.

4. Alleges that he has no information or belief sufficient to enable him to answer any of the allegations contained in paragraph seven of plaintiff's complaint, and basing his answer upon said ground, denies the same.

Alleges that if the purported draft of agreement set out in paragraph seven was delivered to the president and secretary of the Highland Cattle Company, as alleged in paragraph seven of said complaint, that said secretary and president of said Highland Cattle Company knew, or in the exercise of reasonable care would have known that said purported draft of agreement was not a true copy of the agreement executed by said

defendants as parties of the first part and by the said Dodson on behalf of said Highland Cattle Company as party of the second part.

5. Alleges that he has no information or belief sufficient to enable him to answer any of the allegations contained in paragraph eight of plaintiff's complaint, and basing his answer upon said ground, denies the same.

Alleges that if the Highland Cattle Company received the paper writing referred to in paragraph eight of said complaint in the words and figures there set out, he is informed and believes and therefore alleges that the following words, to-wit: "there are to be 9000 cattle above October calves about 90 horses and 1000 acres or more deed land all leases etc." were written in a different hand and with different ink than the remainder of said instrument, and in the handwriting of said Dodson, and said Highland Cattle Company knew, or in the exercise of reasonable care would have known that said language quoted was an interpolation and spurious.

6. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph nine of said complaint, and basing his answer upon said ground, denies the same, but admits that there was presented to said Highland Cattle Company in due course a draft the tenor and effect of which was substantially in the words and figures set forth in said paragraph nine.

7. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph ten of said complaint, and basing his

answer upon said ground, denies the same; except that this defendant admits that said Highland Cattle Company honored and paid in due course the draft referred to in paragraph nine of said complaint.

Alleges that at the time said Highland Cattle Company honored and paid said draft it had notice, or in the exercise of reasonable care would have known, that the paper writing set out in paragraph seven of said complaint purported to be a copy of a certain agreement in writing entered into by the said J. C. Dodson on behalf of said Highland Cattle Company on the one part and said Day & Foster on the other, the original of which was then deposited in escrow with the Bank of Duncan, in the town of Duncan, state of Arizona; and said Highland Cattle Company had notice, or in the exercise of reasonable care would have known that said purported copy was false and fraudulent, in that by its terms the said Day and Foster were represented as agreeing to sell and convey 9,000 head of cattle, as will more particularly appear by the terms of said agreement hereinafter set out.

Alleges that said Highland Cattle Company had notice, or in the exercise of reasonable care would have known, that the said paper writing set out in paragraph eight of said complaint purported to be a receipt for $20,000 as the consideration paid said Day & Foster for their promise to enter into the contract above referred to, and he is informed and believes and therefore alleges that said Highland Cattle Company had notice, or in the exercise of reasonable care would have known, that the following portion of said paper writing, to-wit, "there are to be 9000 cattle above Oc-

tober calves about 90 horses and 1000 acres or more deed land all leases etc." was written in a different hand and with different ink than the remainder of said paper writing, and said Highland Cattle Company knew, or in the exercise of reasonable care would have known, that said language quoted was spurious and an interpolation.

8. Denies that on the 24th day of May, 1913, at the town of Lordsburg, state of New Mexico, or at any other time or place, the defendant S. A. Foster admitted to the president and secretary or the president or secretary of the said Highland Cattle Company, or to any other person, that the instrument, a copy whereof is set forth in paragraph eight of said complaint, was true and correct or true or correct or had been executed by said Day & Foster, co-partners, by him as one of said co-partners, or otherwise. Denies that said Foster then and there, or at all, admitted that the copy of the agreement described in paragraph seven of said complaint was practically a true copy, or a true copy, or a copy of the original agreement deposited with said Bank of Duncan and executed by defendants, or either of them, and by said J. C. Dodson as manager of said Highland Cattle Company, or by said Highland Cattle Company. Denies that thereupon, or at all, said president and secretary, or said president or secretary of said Highland Cattle Company, or said Highland Cattle Company, notified said Day & Foster, or this defendant, that said Highland Cattle Company was willing and ready, or willing or ready, to receive and accept, or receive, or accept, said property described in said copy of agreement set forth in paragraph seven

of said complaint, or to pay defendants the balance of the purchase price therefor.

9. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in that portion of paragraph twelve of the said complaint beginning with the first word in said paragraph to and including the words "by them" in line 18 of page 8 of said complaint, and basing his answer on that ground, denies the same.

Denies that at the time and place referred to in paragraph 12 of said complaint, or at any other time or place, or at all, said S. A. Foster stated to said secretary, or any other person, that the defendants did not own or possess on the 25th day of March, 1913, or at any time since said day, on their cattle ranches in Arizona and New Mexico, nine thousand head of cattle, or any number exceeding about seven thousand head, or that said S. A. Foster stated to said secretary, or any other person, that defendants could not deliver to said Highland Cattle Company a greater number of cattle, including young calves, than seven thousand head.

Denies that at the time referred to in paragraph twelve of said complaint, or at any other time, the secretary of said Highland Cattle Company, or said Highland Cattle Company, stated to said defendant S. A. Foster that said Highland Cattle Company disaffirmed the contract entered into between the Highland Cattle Company and Messrs. Day & Foster.

10. Denies that said J. C. Dodson had no power or authority, express or implied, to bind said Highland Cattle Company to any agreement for the purchase of

said lands, cattle or other property of said defendants, and he is informed and believes and therefore alleges that said J. C. Dodson had full authority in the premises to bind said Highland Cattle Company, and did bind said Highland Cattle Company to the agreement entered into between himself as manager of said Highland Cattle Company and said defendants.

Denies that said Highland Cattle Company never accepted or ratified the instrument set forth in paragraph twelve of said complaint, and alleges that said Highland Cattle Company did accept and ratify said instrument, and is now and forever barred and estopped from questioning or repudiating the same.

11. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph fifteen of said complaint, and basing his answer upon said ground, denies the same.

12. Denies that the sum of $20,000, or any part thereof, with interest from the 31st day of March, 1913, or from any other date, or at all, at the rate of seven per cent per annum, or at any other rate, or at all, is now due and owing, or due, or owing, from said defendants, or either of them, to said plaintiff.

As a further, separate and distinct answer and defense to plaintiff's complaint, defendant alleges:

1. That he is informed and believes, and therefore alleges, on or about the 13th day of January, 1913, one J. C. Dodson, residing at Lordsburg, New Mexico, one Frank E. Humphrey, residing at Reno, Nevada, and one H. F. Dangberg, residing at Carson City, Nevada, at the town of Minden, in the state of Nevada, orally agreed to enter into, and did enter into, a joint adven-

ture for profit, the object and purpose of which adventure was to secure control by purchase, or otherwise, of ranches, large areas of land and cattle and stock in the states of New Mexico and Arizona.

2. That he is informed and believes, and therefore alleges, in furtherance of said purpose said Dodson, Humphrey and Dangberg on about the date last above mentioned caused to be organized a corporation under and by virtue of the laws of the state of Nevada known as the Highland Cattle Company, that the capital stock of said corporation was divided into two hundred thousand shares, of which said Dodson, Humphrey and Dangberg each held 66,666 shares, the remaining two shares being qualifying shares; that the directorate of said corporation consisted of five members, including said Dodson, Humphrey and Dangberg. Said corporation carried on business in the states of New Mexico and Arizona. On January 29, 1913, said Highland Cattle Company caused to be filed with the secretary of state of the state of New Mexico, and thereafter to be published, a certificate stating that the principal office and place of business of said Highland Cattle Company was in Lordsburg, New Mexico, and that the said J. C. Dodson was the duly elected, qualified and acting resident agent of said corporation for the state of New Mexico, and in charge of said principal office and place of business.

3. That he is informed and believes, and therefore alleges, said corporation was under the domination and control of said Dodson, Humphrey and Dangberg, and was used merely as a device and agency to enable them

to further the before mentioned joint adventure for profit.

4. That he is informed and believes, and therefore alleges, said Dodson was the managing agent of said corporation and of said syndicate composed of himself and said Dangberg and Humphrey, and as such, duly authorized to purchase tracts of land, ranches, cattle, stock and other like property, and, as such agent, said Dodson between the 13th day of January, 1913, and the 23rd day of May, 1913, did purchase for the Highland Cattle Company and said syndicate divers tracts of land, ranches, cattle, stock and other like property, and said purchases by said Dodson were well known to this defendant.

5. That on or about the 25th day of March, 1913, at the town of Lordsburg, in the state of New Mexico, the defendant S. A. Foster, acting in behalf of the copartnership of Day & Foster, consisting of said Foster and this defendant, entered into an agreement in writing with said J. C. Dodson as agent of the Highland Cattle Company, which is in the words and figures following, to-wit:

"This agreement, made this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company of Minden, Nevada, party of the second part,

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 ($20,000.00) dol-

lars lawful money of the United States in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc. mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand & 00/100 ($230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrance of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agree-

ment have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER,
S. A. FOSTER,
J. C. DODSON,
Manage. Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.)

(Notarial Seal) B. R. LANNEAU,
Notary Public."

Said agreement, and the deed and bill of sale therein referred to were forthwith placed in escrow with the Bank of Duncan in the town of Duncan, state of Arizona. That on said 25th day of March, 1913, said Highland Cattle Company had notice, or in the exercise of reasonable care would have known, of the contents of said documents so, as aforesaid, placed in escrow.

6. That on said 25th day of March, 1913, said J. C. Dodson paid the consideration of $20,000.00 before

mentioned by drawing a draft upon said Highland Cattle Company in favor of said Day & Foster, for the sum of $20,000.00, in words and figures following, to-wit:

"Highland Cattle Company 8048 No. 112.

March 25, 1913.

Pay to the order of Day and Foster $20,000.00 twenty thousand no-100 dollars

J. C. DODSON,

Buyer.

Dealers and Growers of Livestock, Minden, Nevada."

and by delivering the same to said Day & Foster; that upon the receipt of said draft said Day & Foster forthwith executed and delivered to said J. C. Dodson, as agent for said Highland Cattle Company, the following paper writing, to-wit:

"Highland Cattle Co.
Minden, Nev.

March 26, 1913.

Bought of Day and Foster the following

No. Head	Livestock	Weight	Price	Amount

All their cattle horses and land in Arizona and N. M. amt of this check 20,000.00

Above livestock to be delivered F. O. B. cars..... 191 and, hereby acknowledge receipt of $20,000.00.

J. C. DODSON, Buyer

DAY & FOSTER, Seller."

and said Highland Cattle Company then and there had notice of the contents of said writing at the time it was signed by said Day & Foster and delivered to said J. C. Dodson.

7. That said draft was forwarded and presented in due course to said Highland Cattle Company, and on or about the 31st day of March, 1913, by it honored and paid.

8. By reason of the foregoing the Highland Cattle Company has ratified the said contract; and the said Highland Cattle Company is now and forever barred and estopped from questioning or repudiating the same.

9. That on or about the 20th day of June, 1913, said Day and Foster were ready, willing and able to convey good title to said ranches, cattle and livestock, and other personal property agreed by them to be conveyed in said contract, and on said date last mentioned they made tender of such conveyances to said Highland Cattle Company, and have ever since kept such tender good.

10. That said Day & Foster have performed all and singular the conditions and covenants in said agreement by them to be performed, but said Highland Cattle Company has failed and refused to perform the covenants by it to be performed.

Wherefore, this defendant prays that he may go hence without day, with his costs in this behalf most wrongfully incurred.

J. H. MERRIAM,
JOSEPH L. LEWINSOHN,
HUNSAKER & BRITT,
Attorneys for Defendant Day.

United States of America, State of California, County of Los Angeles—ss.

H. C. Day, being first duly sworn, deposes and says: That I am the defendant named in the foregoing separate answer; that I have read said answer and know the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters, I believe it to be true.

H. C. DAY.

Subscribed and sworn to before me this 28 day of December, 1915.

(Seal) D. M. HUNSAKER,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. No. 299 Civil. In the United States District Court, Southern District of California, Southern Division, Ninth Circuit. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.,* defendants. Answer of defendant H. C. Day. Receipt of a copy of the within is hereby admitted this 28th day of December, 1915. Wm. M. Sims & Madison Marine, attorneys for plaintiff. Filed Dec. 28, 1915. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Joseph L. Lewinsohn. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneys for deft. Day.

Civil No. 299.

In the District Court of the United States in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial before the above-entitled court without a jury (trial by jury having been duly waived by written stipulation entered into between the parties and filed with the clerk of the court prior to the commencement of the trial), on the 20th day of June, 1916, and proceeded from day to day until the trial was completed on the 27th day of June, 1916; and the plaintiff was represented by its attorneys, Wm. M. Sims, Esq., and Olin Wellborn, Jr., Esq., and the defendant H. C. Day by his attorneys, J. H. Merriam, Esq., and Hunsaker & Britt and LeRoy M. Edwards; the defendant S. A. Foster not having been served and not having appeared in the action; and the evidence on behalf of plaintiff, in support of its amended complaint, and on behalf of the defendant H. C. Day, in support of his answer, having been adduced, and the cause having been argued and submitted to the court, the court being fully advised

in the premises, now makes the following findings of fact, to-wit:

1. The allegations of the first, second, third, fourth and fifth paragraphs of the amended complaint are true.

2. During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the states of New Mexico and Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona; and during all the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona.

3. The court finds that on or about the 25th day of March, 1913, the Highland Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day & Foster, which said contract was and is in words and figures as follows:

"This agreement, made this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland

Cattle Company of Minden, Nevada, party of the second part,

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 ($20,000.00) dollars lawful money of the United States in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, *ect.,* mentioned in the deed hereto attached, and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand and 00/100 ($230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrance of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninty head of horses, more or less.

Said party of the first part covenants and agrees

to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER.
S. A. Foster.
J. C. DODSON,
Manage. Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public, in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.)

(Notarial Seal) B. R. LANNEAU,
Notary Public."

4. The court finds that it is untrue that S. A. Foster, or H. C. Day, at any time stated or admitted to the Highland Cattle Company, or any of its officers or representatives, that any contract, other than the contract heretofore set forth, had ever been executed by said Day & Foster with J. C. Dodson; and the court finds that the said contract heretofore set forth was

the only contract entered into between said parties; and the court further finds that it is untrue that the said Day & Foster ever executed the document set forth in paragraph VIII of plaintiff's amended complaint, and that it is untrue that S. A. Foster ever stated or admitted to the president or secretary of Highland Cattle Company, or any other person, that said document set forth in paragraph VIII of plaintiff's amended complaint had ever been executed by said Day & Foster.

5. The court finds that each and all of the allegations set forth in paragraph numbered XIII of plaintiff's amended complaint are untrue.

6. The court finds that each and all of the allegations set forth in paragraph numbered XIV of plaintiff's amended complaint are untrue; and the court finds that the said J. C. Dodson, at the time he entered into said contract of March 25, 1913, did have authority to enter into same for and on behalf of the said Highland Cattle Company.

7. The court finds that Day & Foster were ready, willing and able, at all times, to perform all of the terms and conditions upon their part under the said contract of March 25, 1913; and the court finds that the Highland Cattle Company, on or about the 26th day of May, 1913, repudiated the said contract and refused, without cause, to further comply with the same or to pay the balance of the purchase price set forth therein, and that the said Highland Cattle Company has at all times since failed, refused and neglected to carry out said contract upon its part.

8. The court finds that the Highland Cattle Com-

pany paid to Day & Foster $20,000.00, as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day & Foster by reason of any mistake upon the part of the said Highland Cattle Company concerning said contract or its terms.

9. The court further finds that the said contract of March 25, 1913, was entered into by said Day & Foster without any knowledge upon their part that the said J. C. Dodson intended to perpetrate any fraud upon the Highland Cattle Company by entering into said contract; and the court further finds that neither Day nor Foster at any time prior to May 26, 1913, knew that the said J. C. Dodson had made any false statements or representations to any officers of the Highland Cattle Company, respecting said contract or any fact or circumstance connected therewith.

10. The court finds that neither the sum of $20,000.00 nor any other sum is due or owing or unpaid from the said co-partnership of Day & Foster or from the defendant H. C. Day to the plaintiff.

As conclusions of law from the foregoing findings the court concludes:

1. That the plaintiff is not entitled to recover the amount of money prayed for in its amended complaint, or any sum, from the defendant H. C. Day, and that it take nothing against said defendant H. C. Day.

2. That the defendant H. C. Day is entitled te recover his costs against the plaintiff, herein incurred.

Let judgment be entered accordingly.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: Original. Civ. No. 299. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.,* etc., defendants. Findings of Fact and Conclusions of Law. Filed Sept. 19, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk. J. H. Merriam and Hunsaker & Britt and Le Roy M. Edwards, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneys for deft. Day.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Judgment.

This cause came on regularly for trial before the above entitled court, a jury having been duly waived by written stipulation entered into between the parties to the above entitled action and filed with the court prior to the commencement of the action, on the 20th day of June, 1916; and the plaintiff was rep-

resented by its attorneys, Wm. M. Sims, Esq., and Olin Wellborn, Jr., Esq., and the defendant H. C. Day by his attorneys, J. H. Merriam, Esq., and Hunsaker & Britt and LeRoy M. Edwards; and the defendant S. A. Foster not having been served, and not having appeared in the action, and the evidence on behalf of the plaintiff having been introduced in support of the allegations of its amended complaint, and on behalf of the defendant H. C. Day in support of his answer having been adduced, and the court having made and filed its findings of fact and conclusions of law and ordered judgment accordingly:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court and so ordered that the plaintiff is not entitled to recover against the defendant H. C. Day in the amount prayed for in its amended complaint or any sum whatever;

And it is considered by the court and so ordered that the defendant H. C. Day have and recover against the plaintiff his costs herein incurred taxed and allowed in the sum of $154.00.

Dated Sept. 19, 1916.

OSCAR A. TRIPPET,

Judge.

Judgment entered September 19, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk.

[Endorsed]: Original. Civ. No. 299. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.,* etc., defendants. Judgment. Filed Sep. 19, 1916. Wm. M. Van

Dyke, clerk; by Leslie S. Colyer, deputy. J. H. Merriam and, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneys for deft. Day.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, defendants. No. 299 Civil.

I, Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered in the above entitled action, and recorded in Judgment Register No. 2 of said court for the Southern Division, at page 374 thereof; and I do further certify that the foregoing papers hereto annexed, constitute the judgment roll in said action.

Attest my hand and the seal of said District Court, this 22nd day of September, A. D., 1916.

(Seal) WM. M. VAN DYKE,
Clerk.
By LESLIE S. COLYER,
Deputy Clerk.

[Endorsed]: No. 299 Civ. In the District Court of the United States for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Co. vs. H. C. Day *et al.* Judgment Roll. Filed Sept. 22, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk. Recorded Judg. Reg. Book No. 2, page 374.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Amended Bill of Exceptions.

This cause came on regularly for trial in the above entitled court without a jury (a trial by jury having been duly waived by written stipulation between the parties, and fixed with the clerk of the court), on the 20th day of June, 1916. and proceeded from day to day until the trial was completed on the 27th day of June, 1916, Wm. M. Sims, Esq., and Olin Wellborn, Jr., Esq., appearing as attorneys for the plaintiff, and Messrs. Hunsaker and Britt, LeRoy M. Edwards, Esq., and J. H. Merriam, Esq., appearing as attorneys for the defendants; the cause having been submitted to the court, the court thereupon rendered its findings in writing which are on file herein, among which are the following:

XX "2. During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the state of New Mexico and in

Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson, was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona, and during all of the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona.

"3. The court finds that on or about the 25th day of March, 1913, the Highlands Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day and Foster, which said contract was and is in the words and figures as follows:

"This agreement, made this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, party of the second part.

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 ($20,000.00) dollars lawful money of the United States in hand paid to the party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part hereby grant, bargain, sell and convey unto the said

party of the second part, all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand 00/100 ($230,00.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrance of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER.
S. A. Foster.
J. C. DODSON,
Manager Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public, in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.

B. R. LANNEAU,
Notary Public."

XX "6. The court finds that each and all of the allegations set forth in paragraph numbered XIV of plaintiff's amended complaint are untrue; and the court finds that the said J. C. Dodson, at the time he entered into said contract of March 25, 1913, did have the authority to enter into same for and on behalf of the said Highland Cattle Company."

XX "8. The court finds that the Highland Cattle Company paid to said Day and Foster $20,000.00, as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day and Foster by reason of any mistake upon the part of the said Highland Cattle Company, concerning said contract or its terms.

XX "10. The court finds that neither the sum of

$20,000.00, nor any other sum is due or owing or unpaid from the defendant, H. C. Day to the plaintiff.

Plaintiff excepts to all of the findings above quoted, and to each and every one thereof, on the ground that there is no evidence to support such findings, or any one or more of them.

The following is the evidence and all of the evidence introduced at the trial of said cause which related to the matters embraced in said findings.

H. F. DANGBERG, a witness called on behalf of the plaintiff, being first duly sworn, *d*estified on

Direct Examination

as follows:

I reside in Minden, Nevada, and am engaged in the business of general farming and livestock. I am now, and since the month of May, 1913, was the secretary and treasurer of the Highland Cattle Company. I first saw the document headed "Agreement" and set forth in paragraph seven of plaintiff's complaint, on the 30th day of March, 1913, at the Overland Hotel, at Reno, Nevada, in the presence of Dodson and Humphrey. Mr. Dodson stated that the document was a carbon copy of an original that was in the Bank of Duncan, Duncan, Arizona, and that it purported to be a trade and option that he had taken with the Foster and Day people on the "Lazy Bee" outfit. (The following is a copy of said agreement marked "Plaintiff's Exhibit 3:)

(Testimony of H. F. Dangberg.)

"AGREEMENT.

This agreement made this 25th day of March, in the year of our Lord one thousand nine hundred and thirteen between Day & Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of Day and Foster, party of the first part, and J. C. Dodson, Manager of the Highland Cattle Company, of Minden, Nevada, party of the second part, witnesseth:

That for and in consideration of the sum of twenty thousand ($20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto said party of the second part, all cattle, horses, real estate and farming implements mentioned in the deed hereto attached, and the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand ($230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the 20th day of June, 1913.

The said party of the first part guarantees there to be nine thousand (9,000) head of cattle, calves from October, 1912, not to be counted. The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned, and said

(Testimony of H. F. Dangberg.)

party of the first part guarantees that all property mentioned in said papers is free from all incumbrances whatsoever kind and that they have a good and perfect title to the same. The deed hereto attached covers one thousand (1,000) acres of land, more or less. The bill of sale hereto attached covers nine thousand (9,000) head of cattle and ninety head of horses. The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof the said parties to this agreement have hereunto set their hands and seals March 25, 1913.

. . . . . .

. . . . . .

. . . . . .

The defendants moved that the above testimony relating to Dodson's conversation with the witness concerning said agreement be stricken out, as *here*-say, incompetent, irrelevant and immaterial and not said in the presence of the defendants and was a gratuitous statement of the plaintiff's own agent, whereupon the court sustained the motion, to which ruling of the court plaintiff duly excepted.

Plaintiffs then offered to prove by this witness that Dodson in the presence of Mr. Humphreys and this witness, handed them the contract that is in evidence (Plaintiff's Exhibit 3), and stated to them at that time, that the original of this contract, which he and defendant Foster had signed, was placed in escrow in

(Testimony of H. F. Dangberg.)

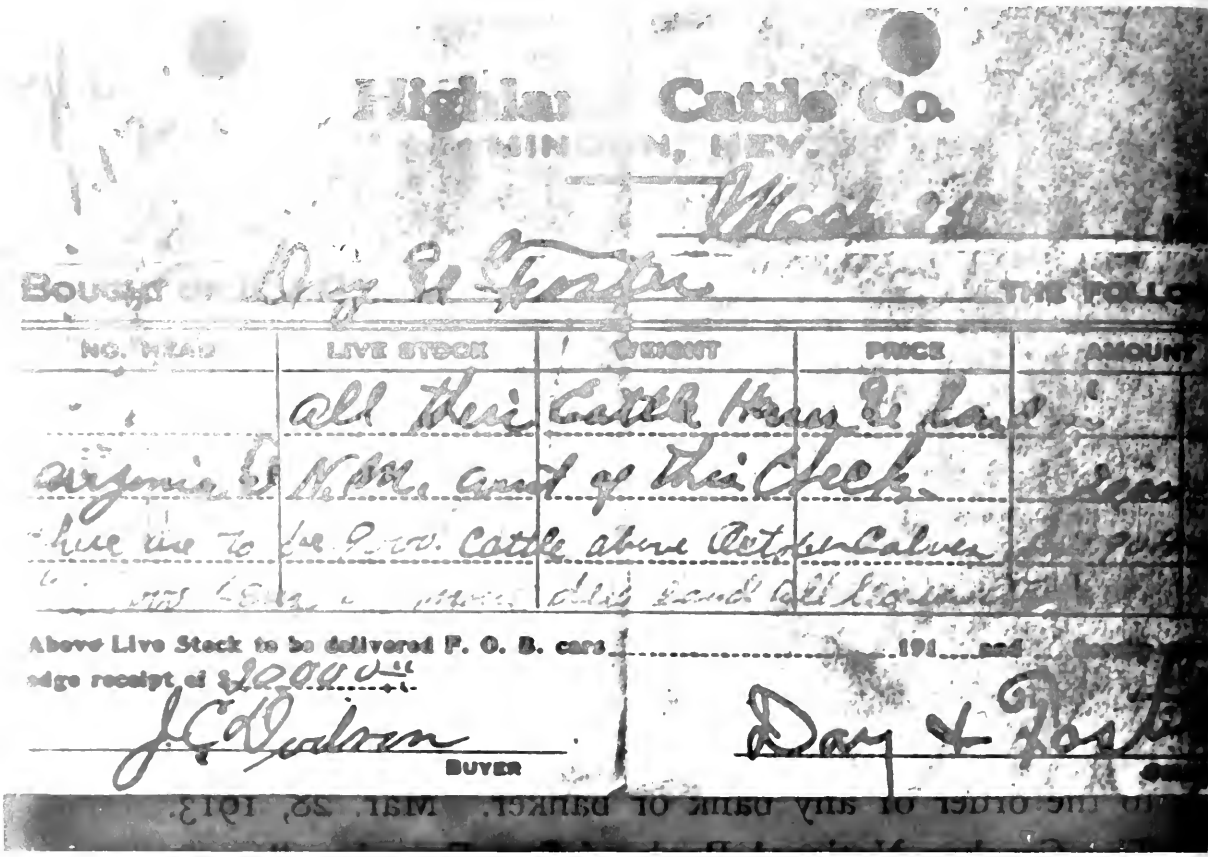
the Duncan Bank, and that there were to be bills of sales and other papers also deposited in the bank.

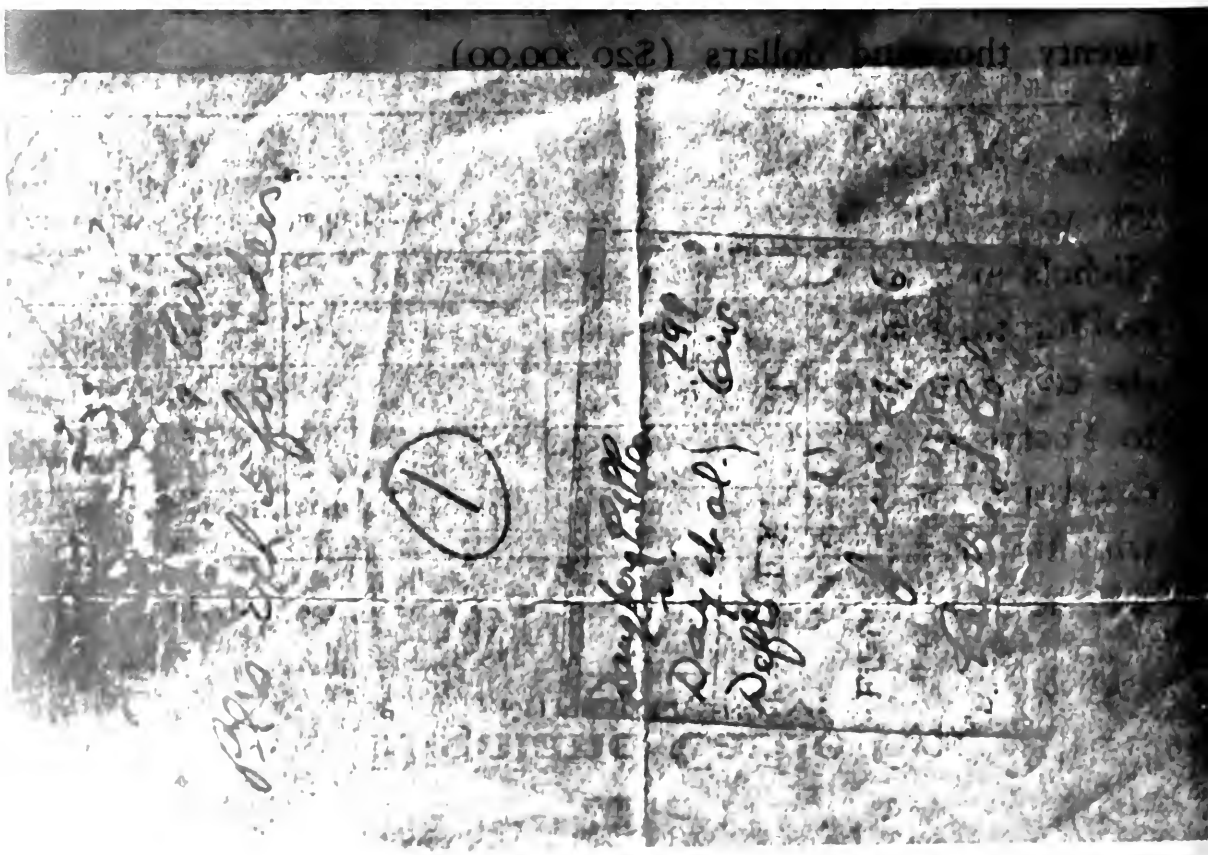
The court refused the offer and stated that any such testimony as offered had been ruled out.

On the 30th day of March, 1913, when I returned to my office in Minden, Nevada, I received by mail a draft for twenty thousand dollars ($20,000.00) in favor of Day and Foster on the Highland Cattle Company, also a receipt bearing the same date, signed by Day and Foster. The following is a photographic copy of said receipt, which is now in the same condition as it was when received by me:

(Here insert photographic copy of said receipt and indicate thereon the different colored inks.)

(Testimony of H. F. Dangberg.)





(Testimony of H. F. Dangberg.)

And the following is a copy of said draft:

"Highland Cattle Company. 8048 No. 112.

March 25, 1913.

Pay to the order of Day and Foster....$20,000.00

twenty thousand .....no-100 dollars.

J. C. DODSON,

Buyer.

Dealers and growers of livestock, Minden, Nevada. Farmers Bank of Carson Valley, Inc. Paid Mar. 31, 1913. Minden.....Nevada."

Endorsed: Day and Foster. Pay to the order of any bank or bankers all prior endorsements guaranteed. The Bank of Duncan, 91-64 Duncan, Ariz. 91-64. B. R. Lanneau, cashier. For collection. Pay to the order of any bank or banker. Mar. 28, 1913. The Crocker National Bank of San Francisco."

I glanced over the advice and saw that the amounts were comparable and thereupon took up the draft of twenty thousand dollars ($20,000.00).

I first saw the contract which was placed in escrow in the Bank of Duncan, Duncan, Arizona, about May 26, 1913, Mr. Foster, the cashier of the bank, Mr. Nichols and myself were present at the time. After reading the contract over we stated that we repudiated the contract and demanded the money back. I said to Foster we will take the cattle at $27.00 a head, October calves thrown in, the ranches and lands to go with the trade, and Foster returned the contract and said he would not do anything of that kind, or words

(Testimony of H. F. Dangberg.)

to that effect. We talked over the advice on which we paid the $20,000.00. Mr. Foster stated he signed the advice but that it had been changed since he signed it.

At that time Foster said he thought they had around seven thousand head of cattle, that they didn't have nine thousand, possibly less than seven thousand."

Dodson occupied the position of ranch manager for the Highland Cattle Company. There was no contract as to Dodson's employment with the Highland Cattle Company. His duties were to look after the cattle and mills and general superintendency of the Highland Cattle Company.

Mr. Humphrey and myself met Dodson at Lordsburg, about the middle of February, 1913. I believe at that time we talked over with him about looking up other cattle deals and reporting to us, and seeing if we could get any options, and reporting to us. We talked over the "Lazy Bee" deal with him and directed him to see what kind of an option we could get on it on the basis of so much a head. Mr. Humphrey and myself, as president and secretary of the Highland Cattle Company, told him to go ahead. He told us he could get the "Lazy Bee" matter settled for $27.00 per head, October calves thrown in, and the lands and other holdings of the company to go in with the trade. I told him if he could buy the outfit on that basis to go and get an option and get the option extended so we could get back to Nevada and arrange our finances to take over the deal

(Testimony of H. F. Dangberg.)

on the basis as he had reported it to us, telling him also to arrange the payments as small as he could, giving us time and opportunity to fix our finances in regard to handling this deal; that was about the extent of our conversaiton.

About the 13th day of March, 1913, Dodson and myself went to Santa Fe. We discussed the "Lazy Bee" matter and he presented the thing to me in the same way, and stated he thought he could buy an option upon the Lazy Bee" on the basis of $27.00 per head, October calves thrown in, and the rest of the holdings to go in and he thought he could get a reasonably small payment down and we could finance it and put it over. I told him if he could make the deal on that basis, I could get the boys in Nevada to stand behind the deal, and we could finance it and put it over. I, as secretary of the company, gave him no other authority than just stated in the two conversations mentioned.

Q. By Mr. Sims: This is the minute-book of the Highland Cattle Company, is it not?

A. It is.

Q. Have you examined it, and do you know the contents?

A. I do.

Q. Is there any written authority of any kind or manner authorizing Mr. Dodson to purchase the "Lazy B" cattle?

A. There is not.

I received a letter from Dodson, dated February 26, 1913, a few days after it was written, as follows:

(Testimony of H. F. Dangberg.)

"February 26, 1913. H. F. Danberg. Friend Fred: I saw Foster can trade with Lazy "B" something like the lines Frank talked of. Can sell anything and he will collect his money as they are turned over he thought might make a loan of $75,000 on the property for one year was sure could have $50,000 for one year—Prices are as I gave them to you. When I get pressing him I find he has—7 sections leased out where we were. has 3 sections bought five with absolute lease—making 15 sections controlled beside the other deeded land he has—I can get 15 days time to finish deal with I think I can contract enough to meet first payment the second payment to be made by June 1st unless there would be some sales made and deliveries beforehand—

If James don't want to come in arrange with Frank so we can buy this and less sell down so we will get control of the range—he is getting a 3 ct. an acre lease—I certainly can get the same I will try awfully hard at any rate.

I am going to Los Cruses today and see what I can do I might go on to Santafe if think can do any good by so doing. I am enclosing you two vouchers—one $150.00 for my personal expense. One for $500.00 for Henry—as you will see by them let me know as soon as possible what to do about the Lazy B will let you know the result of my Los Crusas trip I didn't see the Big Buy on this trip am strictly decent.

Resp. yours,

J. C. DODSON.

(Testimony of H. F. Dangberg.)

Scott and bunch still here I don't think they will ever leave."

Cross-Examination

By Mr. Edwards:

Q. Did I understand you to say that Mr. Dodson bore or sustained no other relation towards the Highland Cattle Company, except that as superintendent of the ranch?

A. That was the only relation he sustained.

Q. Wasn't he the vice-president of the company?

A. Yes, he was vice-president.

Q. Wasn't he a director of the company?

A. He was a director.

Q. Was he elected general manager of the company?

A. He was not.

Q. Under your minutes of your initial meeting of the Highland Cattle Company, was he not elected to fill a position created under the by-law as general manager and superintendent?

Q. He was appointed resident agent for the corporation in New Mexico, was he not?

A. He was.

Q. And do you say he was not the general manager of the company?

A. He was not general manager.

Q. Do you remember testifying before the grand jury in New Mexico in September, 1913?

A. I do.

Q. I will ask you if you did not at that time state as follows (reading): "Q. You had best state the

(Testimony of H. F. Dangberg.)

relation of James C. Dodson to you and that company.

A. At any time during the transaction that occurred Mr. Dodson was supposed to be a director of the Highland Cattle Company and came here as ranch manager for the company; he was to attend to the ranch affairs and pay the expenses of the ranch, look up deals and transactions for the company, present these deals and transactions to the board of directors and myself, as managing director for our corporation." Is that true?

A. I may have made that statement.

Q. It is true, is it not?

A. He was ranch manager, yes; that is true.

Q. Your by-laws provide for the election of a general superintendent and manager of the corporation, do they not?

A. Yes.

Q. And who was elected to fill that position at that time during the month of March, 1913?

A. To my recollection there was no one selected; that was passed over.

Q. I will ask you if at this same hearing if you were not asked the following questions at that time and place? (Reading): "Q. Was he at that time" —this is speaking of the 30th day of March, 1913— "Was he at that time an employe of the company? A. Yes. Q. Did they make him that superintendent? A. Yes; he had been made manager of the company."

A. I don't remember having made that statement.

Q. (Continuing reading): "Q. When was he

(Testimony of H. F. Dangberg.)

made manager? A. When the company was incorporated. "When was the company incorporated? A About the 13th day of January, 1913."

Q. By the Court: Did you so testify at the time and place specified?

A. I don't remember having made exactly that statement.

Q. What was your testimony on the subbject?

A. My testimony at all the time was that he was ranch foreman—ranch manager.

Q. By Mr. Edwards: You will swear then that you did not testify as I have read to you at that time?

A. No, I will not—

Q. But you won't swear that you did testify to that?

A. I won't swear that I didn't testify to that, but I don't remember the testimony.

Q. By the Court: Sir?

A. I don't remember the exact testimony given at that time.

Q. Well, if what he has read there is the truth, you testified to it, didn't you? If it is not the truth, you didn't. What did you do about it?

A. Well, I don't remember, but I don't think I testified that way, that he was general manager; I testified that he was ranch manager. If I did testify that he was general manager, I was wrong in my testimony.

Q. By Mr. Edwards: Your memory is no fresher now than it was then as to the facts?

A. No.

(Testimony of H. F. Dangberg.)

Q. I will ask you if you testified before the *habeas corpus* proceedings of Dodson down in New Mexico in 1913?

A. I believe I did.

Q. I will ask you if at that time you did not testify as follows (reading): "Q. For whom was Mr. Dodson acting in making this transaction? A. In behalf of the Highland Cattle Company, a managerial position and a shareholder of the company, representing the company here and doing business which would have to be subsequently ratified."

A. I believe I testified to that.

Q. That is true, is it not?

A. It is true.

Q. That he was representing the company there?

A. In a managerial position.

Q. I will ask you if you did not testify as follows at that time? "Q. He was sent down there to conduct the business of this corporation in this region? A. He was. Q. And that business was to be the buying and selling of cattle? "Yes." Did you so testify at that time?

A. I might have testified to that.

Q. Is it true?

A. No, it is not true.

Q. It is not true?

A. Please repeat that question.

Q. (Reading): "He was sent down there to conduct the business of this corporation in this region? A. He was. Q. And that business was to be the buying and selling of cattle? A. Yes."

(Testimony of H. F. Dangberg.)

A. I don't remember that I made that exact answer; if I did, I was wrong.

Q. You were wrong?

The Court: When was that testimony given?

Mr. Edwards: Before the *habeas corpus* proceedings.

The Court: What is the date of it? Where?

Mr. Edwards: State of New Mexico. I will give the exact date.

The Court: You want to state the time, place and circumstances.

Mr. Edwards: We have got it here. I had it in my office.

Q. By the Court: Do you remember when that *habeas corpus* proceedings took place?

A. I do not exactly, Judge.

Mr. Edwards: We have the transcript of proceedings here somewhere.

Q. By the Court: About when?

A. I think it was sometime in May.

Mr. Merriam: I think it was about the fore part of June, 1913.

Q. By the Court: Where?

A. At Silver City.

Q. At New Mexico?

A. New Mexico.

Q. Sir?

A. New Mexico.

The Court: That is all, Mr. Edwards. Proceed with the case.

Mr. Edwards: We will produce them. It seems

(Testimony of H. F. Dangberg.)

they were not bought here. We have those complete transcripts.

The Court: Well, he has testified definitely enough about that, I suppose.

Mr. Edwards: We have a certified copy of the proceedings. It is dated the 13th of June, 1913.

Q. That is about correct, is it not?

A. That is about correct, as I remember it.

Q. Mr. Dodson was an owner of one-third of all the capital stock of the Highland Cattle Company, was he not, in March, 1913?

A. He was presumed to be.

Q. Well, there was one-third of the capital stock stood in his name, that was true?

A. The certificate was issued but never delivered.

Q. The certificate was issued to him for one-third of the stock?

A. But never delivered to him.

Q. By the Court: Was he a subscriber for it?

A. He was a subscriber for it.

Q. By Mr. Edwards: And his holdings at that time were equal to the holdings you had subscribed for?

A. Supposed to be.

Q. Well, they were, were they not, equal?

A. They were supposed to be at that time, yes.

Q. Well, you have seen your articles of incorporation that you have introduced in evidence here?

A. Yes.

Q. You acknowledged those to be correct, did you not, at the time they were executed?

(Testimony of H. F. Dangberg.)

A. Yes, sir.

Q. I will call your attention to your articles of incorporation, which state as follows (reading): "The business affairs of this corporation shall be conducted by a board of five members who shall be styled directors. The names and residences of those who have been elected for the ensuing year, and who also are subscribers to all of the capital stock of this corporation, which is issued in full and fully paid together with the number of shares subscribed for each are as follows:

Name:	Shares:
J. C. Dodson, Lordsburg, New Mexico,	66,666 shares
Frank E. Humphreys, Reno, Washoe county, Nevada,	66,666 shares
H. F. Danberg, Minden, Douglas county, Nevada,	66,666 shares

J. B. Danberg, 1 share, J. G. Sweeney, Carson City, Nevada, 1 share." Is that correct?

A. That is correct.

Q. And you acknowledged these articles to be true, did you not?

A. Yes.

Q. And Mr. Dodson had not parted with any of this stock up to the end of March, 1913, had he?

A. No.

Q. The corporation caused to be filed in the state of New Mexico, did it not, before the first of March, 1913, a certificate appointing Dodson as resident agent and manager for your company in that state?

A. It did.

(Testimony of H. F. Dangberg.)

Mr. Wellborn: That is objected to as immaterial and not proper cross-examination.

The Court: I don't think it is proper cross-examination.

Mr. Edwards: I was going into the question of agency.

The Court: Oh, yes. Objection overruled.

Q. By Mr. Edwards: At the time you had a conversation with Mr. Dodson, and which you place about the middle of March, 1913, in the town of Lordsburg—

Mr. Sims: No, the 13th of February.

Mr. Edwards: He mentioned two conversations. The second one was the 13th of March.

The Witness: That was on the road to Santa Fe.

Q. By Mr. Edwards: You stated at that time that you told him that if he could get an option, is that correct?

A. Yes.

Q. Did you use the word "option."

A. I always talked with him in options, yes.

Q. Do you recall testifying a *habeas corpus* proceeding in June 13th, 1913.

The Court: He said he did, Mr. Edwards.

Q. By Mr. Edwards: And you remember testifying in the criminal trial of Dodson a little later than that in New Mexico, in March, 1913?

A. Yes.

Q. Do you remember whether there at either of those two trials you ever mentioned the word "option"

(Testimony of H. F. Dangberg.)

in regard to your conversation with Dodson?

A. I don't remember.

Q. Are you willing to state that you have ever testified at any time prior to this that you spoke to him about getting an option?

A. Not as to my former testimony, I am not positive.

Q. I will ask you if, at the time you testified before the grand jury in New Mexico, in September, 1913, you did not testify as follows: "We have here the case whereby he obtained $20,000, the Foster and Day case. I was down here in person looking over the affairs of the company in Lordsburg in March—around March 13th. Mr. Dodson represented to me that he could buy the "Lazy B" outfit, nine thousand head of cattle, all the horses and everything for $250,000, and I told him that I would take the matter up with the president, Mr. Humphrey, and I thought we could make the deal on that basis and could raise the money and go through with it. After talking it over we authorized him to go ahead and make the deal on his representations."

Q. By the Court: Did you so testify before the grand jury?

A. I don't remember as to that testimony, but if it is there, I undoubtedly did.

Q. By Mr. Edwards: You won't swear that you did not?

A. I won't swear that I did not.

Q. Is that true?

A. Not as to the full conversation, no.

(Testimony of H. F. Dangberg.)

Q. What did you testify was true or untrue?

A. In part true, but it did not go on fully with the deal as explained.

Q. Well, is that part true, that you authorized him to go ahead and make the deal?

A. We authorized him to go ahead and get an option.

Q. And get an option?

A. Yes.

Q. And you didn't say that at that time, did you?

A. That is the words I used at that time with Dodson; whether I stated that on that evidence, I don't know.

Q. Did Dodson speak to you about buying the "Lazy B" outright for a lump sum rather than so much a head for the cattle?

A. He talked of it in that way, explaining to me that it was on the basis of $27 per head, that the deal was $250,000, but that the cattle—anything less than the nine thousand head of cattle would count off the lump sum of $250,000, on that basis of $27 a head, making the ranches and the holdings $7000 secured in; that is as I explained the deal.

Q. You mean buy all their ranches for $7000?

A. That was the explanation.

Q. Do you know the extent of their ranches? Did you inquire?

A. I didn't know how extensive they were.

Q. Didn't you know there was over a thousand acres?

A. Yes, I knew there was over a thousand acres.

(Testimony of H. F. Dangberg.)

Q. And you expected to buy those for $7 an acre?

A. That is what I expected to pay then if we bought them on that trade.

Q. You had gone over the property yourself, had you not, in March, 1913?

A. I don't believe prior to this time.

Q. Didn't you go over the ranch—the Day and Foster ranch, or part of it, in 1913?

A. I did go over it sometime in 1913; I forget the exact date.

Q. In an automobile driven by a man named Owendy?

A. Yes.

Q. Examine the ranch itself?

A. Yes.

Q. How many times did you go over it?

A. Went over it just once, partially; just one time.

Q. What was your relationship to the Highland Cattle Company?

A. Secretary-treasurer.

Q. Were you not managing director?

A. I have never had any authority as managing director.

Q. I will call your attention to this part of your testimony before the grand jury in 1913, in New Mexico, and ask you if you did not testify as follows, speaking of Dodson: "He was to attend to ranch affairs and pay the expenses of the ranch and look up deals and transactions for the company and present these deals and transactions to the board of

(Testimony of H. F. Dangberg.)

directors or to myself as managing director for our consideration."

A. If I made that statement, I was mistaken.

Q. That was not true? You say that Mr. Dodson had to submit everything to you or Mr. Humphreys before you would pass upon it?

A. Yes, sir.

Q. You left none of these matters to his own discretion?

A. None whatever.

Q. Buying and selling of cattle?

A. None whatever.

Q. I am going to show you a letter, Mr. Danberg, and ask you if that is your signature and if you wrote that letter on or about the date it bears?

A. I did.

Q. To Mr. Dodson?

A. To Mr. Dodson.

Mr. Edwards: I will read this letter and offer it in evidence as Defendant's Exhibit (reading):

"Feb. 1st, 1913.

Mr. J. C. Dodson,

Lordsburg, New Mexico.

Friend Dodson:

Frank came up this morning and we have all been together and have had a good, dignified meeting of the Highland Cattle Company. Read your several letters, and bought a drink on the strength of same. That it was the sense of said meeting that if you could get any such a price as $40.00 for cows, $30.00

(Testimony of H. F. Dangberg.)

for yearling steers, or $25.00 for yearling heifers, that you bust ahead. We will be perfectly satisfied with whatever you may do in the premises, but we kind of feel as though selling the old cows would be better than to sell the yearling heifers, at least best to hold on to the best of said yearling heifers at any rate, but being on the ground, of course you will know best, and also that if you can't get just the top figure, your judgment will be acceptable at any and all times.

We are getting our saddles oiled up, getting some leather chaps, getting some double cinches made, and you may look for any time after the 10th of the month and we will wire you a day or two before we leave San Francisco.

Also that we are arranging for fifty in Reno, which you will understand, and will be able to go that far anyway, if not further.

And now, with best wishes to you for all here, we are,

Yours very truly,
H. F. DANBERG,
Sec'y.

HFD-M

P. S. We are sending under separate cover one hundred of the drafts with a cover for same. Also, if my grip is at Lordsburg, hold it there and I will get it at that point. The draft and telegram have just arrived, and have taken up draft, and everything alright."

(Testimony of H. F. Dangberg.)

We offer that in evidence.

Mr. Wellborn: Objected to as immaterial.

The Court: I think it has a material bearing on his agency and powers. Overruled. What is the date of it?

Mr. Edwards: February 1st, 1913.

The Clerk: Defendant's Exhibit "A."

Q. By Mr. Edwards: Do you know what the prevailing price was of ranch cattle around about Duncan in March, 1913?

A. About $27 or $28 a head.

Q. It was not $30, was it?

A. Not living there and not trading there, I could not state positively. I thought it was about $27 or $28 a head.

Q. I will show you a letter—this does not pertain to this last question—dated February 4, 1913, signed H. F. Danberg, and ask you if you wrote that letter on or about the date it bears?

A. Yes, sir.

Mr. Edwards: We will read this and later offer it in evidence (reading):

"Minden, Nevada, Feb. 4th, 1913.

Mr. J. C. Dodson,

Lordsburg, N. M.

Friend Dodson:

Your letter of February 1st just to hand, and note that things are getting pretty lively with you, and am truly hopeful that you will have things lined up for the Lazy B by the time Frank and I reach there.

(Testimony of H. F. Dangberg.)

Now have your telegram, and also note in your letter that you want us to wait untill Cattlemens Convention, but Frank and I have arranged our other matters here, and making it possible for us to leave here about the 14th, stopping in the City to see James for a day or so, and leaving Lordsburg somewhere about the 20th of the month, having to be home shortly after the first of March, as we both have matters to demand us here, so trust you can pull that Cattlemens Convention off to your liking, as we would like to attend some while there.

I am having a sample chute made, or rather a model of a chute, and will send it to you in a few days, as it might help you in building the new one.

The writer notes the prices you have been offered, and it certainly looks good and if you don't get the other price, the offer will be good anyway, although every one will be pleased of course, if you hit the top notch.

While in the city seeing James, we will have other connections, providing James does not come in, and also note your propositions on the state land, which certainly looks good for big protection to the range.

That telegram that you sent on the 25th arrived alright, stating to protect draft, but what I was trying to impress was that you should state the amount; also follow up with written form as soon as possible, so we could at all times be protected from what some outsider might want to put over on us.

If you write immediately on receipt of this letter,

(Testimony of H. F. Dangberg.)

will possibly get same before I leave, otherwise a wire will reach me up till noon on the 12th.

And now, with best wishes to you, and for the success of the enterprise, believe me,

Yours very truly,

HFD—M. H. F. DANBERG."

Mr. Edwards: We offer that letter in evidence.

The Clerk: Defendant's Exhibit B.

Q. By Mr. Edwards: Did Mr. Dodson make any other deals down there for you on or about this time of the purchase of cattle or ranches?

A. Not for the Highland Cattle Company, I don't believe.

Q. What about the Wilson deal?

A. He made the Wilson deal. That was one of the original deals before it was the Highland Cattle Company—No. That did go into the Highland Cattle Company.

Q. That was made after the Highland Cattle Company was incorporated?

A. Yes, sir.

Q. He made it for you?

A. Yes, sir.

Q. How many head of cattle was that?

A. I forget just what that deal was. There was so many head—it was a bogus contract also.

A. There were several thousand head of cattle, were there not?

A. Yes, sir.

Q. I show you this letter of March 24, 1913, and

(Testimony of H. F. Dangberg.)

ask you if you wrote that on or about the date it bears?

A. Yes.

Mr. Edwards: I will ready this letter (reading):

March 24th, 1913.

Mr. J. C. Dodson,
Lordsburg, New Mexico.

Dear Jim:

Frank came up from Reno this morning, and we have been around the ranch looking at fat cattle and eating ham and eggs the balance of the time, and in between spots have been thinking of you and twisting the proposition over in our minds, and of course will be anxious to have your letters that you spoke about in telegram.

We note that there is some soft spot spoken of in the El Paso Times, and which of course makes us feel a little anxious as to what you may do on your contracts, although note you have had a rain thus making it hard to show your buyers the cattle. We are both anxious for the Lazy B deal and hope to hear from you before the week ends regarding same.

We will await a letter from you before going to San Francisco the first of next week, which trip will be taken in the matter of finances, and will depend greatly upon what you may do this week.

We have been wondering whether or not you could close out the Wilson contract on the last two lots as a whole and to our advantage, meaning holding the mills, etc., but of course you have thought of this

(Testimony of H. F. Dangberg.)

yourself undoubtedly, and we know that you will make your deals to our best advantage. At any rate we are going to advise that you sell down as close as possible, even though you had to drop a couple of dollars per head in order to make the deal go through, as from what we have been able to learn at this end, it is going to be a close game for money, as the banks are all tightening up, and you will understand from this explanation what we are anxious to have you do.

Wish you would telegraph on receipt of this, as know you will anyway, as we are anxious to keep in close touch prior to our leaving for San Francisco; also that Frank is figuring to be with you sometime before the first of May.

The weather is very cold here, some snow, and a good warm day in El Paso wouldn't look bad; also that the rain there, while rather inopportune, will certainly insure feed and fat cattle for a later delivery, but "ease up," as that's the dope.

And now, with best wishes from Frank and myself, and that you keep well and be able to hit the iron while she's hot.

Yours very truly,

H. F. DANBERG,

HFD-M Sec'y.

P. S. Frank says to tell you that we have inquiries for fat cows for May and June, which of course is well for you to know, and what is your opinion as to their condition at that time. Again goodbye."

(Testimony of H. F. Dangberg.)

Q. By Mr. Edwards: I will show you a letter dated January 29, 1913, and ask you if you signed that letter and sent it on or about the date it bears?

A. Yes, sir.

Mr. Edwards: I will read this letter: (Reading)

"Minden, Nevada, Jan. 29th, 1913.

Mr. J. C. Dodson,

Lordsburg, N. M.

Friend Dodson:

We wired you this day to the effect that Silver City Bank had wired us, asking honor on $10,000.00 draft drawn by you, and that we had received no advice from you. From your letter we expect this draft is alright, but we have had no advice as to the exact amount, so wired the Silver City Bank that we would honor said draft upon finding signature correct, which would give us time to have advice from you, and answer to our telegram to you, which we expect today.

The draft books have just been finished, and Frank is sending same to you tomorrow, and while they will do for the present time, believe that we can get up something better in the hereafter.

I have taken full note of your letter, and things certainly look fine and dandy, and also to tell you that expect Frank here tomorrow or next day, and we will then go to the city as soon as possible after his trip here, and thus to see James, so when we come to Mexico, which will be in a few days or possibly about the middle of next month, trust that will be

(Testimony of H. F. Dangberg.)

prepared with all finances necessary to put over the Lazy B deal.

We are still figuring on handling some of the stuff up at this end, but if prices are as you state, it will make it almost impossible to ship cattle here at a profit, although believe we will figure some way to stock this end up as well.

And now, with best wishes, and trusting to hear from you again with full details of deal, and also to see you, in company with Frank in the near future.

Before closing will ask that when you draw any checks or drafts that are to be paid at this end that you wire if amount be large; also follow up with written instructions immediately, so as to protect this end, thus to make it impossible for an outsider to slip one over on us.

Again with best wishes, I am,

Yours very truly,

HFD:M H. F. DANBERG."

Q. By Mr. Edwards: I will ask you if you wrote this letter and sent it through the mails on or about the date it bears?

A. Yes, sir.

Mr. Edwards: I will read the letter dated February 9, 1913. (Reading:)

"Minden, Nevada, Feb. 9th, 1913.

Mr. J. C. Dodson,

Lordsburg, N. M.

Friend Dodson:

(Testimony of H. F. Dangberg.)

Have just had talk with Humphreys over the phone and he is leaving for San Francisco tonight. That I am expecting to leave here the night of the 12th, meeting Humphreys in San Francisco the 13th or 14th, staying there one day, and then to Lordsburg, arriving there the fifteenth or sixteenth.

That everything is all fixed at this end and that we will have all finances in shape to handle the contemplated deal. Also that am expecting to hear from you tomorrow or next day before leaving.

With best wishes, I am,

Yours very truly,

HFD-M H. F. DANBERG."

Q. By Mr. Edwards: I show you a letter that is unsigned, addressed to Dodson February 25, 1913, and ask you if that letter is in your handwriting, and ask you if you sent it on or about the date it bears.

A. That is my handwriting, yes.

Q. You sent that letter on or about that time?

A. Yes, sir.

Mr. Edwards: Letter from Los Angeles, Cal., 2/25/13: "Dear Dodson: Just arrived L. A. & going to stay over day. Frank also here as could not get reservation.

It has been raining all over the state and guess you will make the 31 or 33 for the yearlings as California will be hunting them.

Hope you get a tie up on the B as it all looks good and no country looks so good to the west of us and

(Testimony of H. F. Dangberg.)

we will be anxious to hear from you also that will write you again from San Francisco.

With best wishes to all, I am,

Yours very truly,

Q. By Mr. Edwards: Does that 31 or 33 refer to dollars?

A. Yes.

Q. The price for yearlings?

A. Yes, sir.

Q. I understood you to say a while ago that 27 or 28 was the price of cattle?

A. I made that statement that it was 27 or 28.

Q. You state here 31 or 33.

A. For yearlings.

Q. By Mr. Edwards: I show you a letter dated March 5th, 1913, and ask you if you wrote that letter on or about the date it bears?

A. Yes, sir.

Mr. Edwards: Letter dated March 5, 1913. (Reading.)

"Minden, Nevada, March 5th, 1913.

"Mr. J. C. Dodson, El Paso, Texas.

Friend Jim:

Was with Frank in Carson yesterday talking over the Lazy B matter, asking you the last possible date you had on making the Lazy B deal; also that I thought it best that I should go down again and be with you and thus to assist you in contracts, etc., as I would have to use these contracts to some extent in securing the necessary loan for this extra deal, and

(Testimony of H. F. Dangberg.)

am expecting telegram from you in answer to mine of yesterday. Also stated in telegram to take at least fifty thousand acres, or sufficient to secure the range, but from reading your letter, note that the Lazy B have taken up much of the territory and that we went over, and all of which we have given consideration, and can see the importance of holding the Lazy B outfit in order to have complete control of the range.

"If secure a favorable reply from you, also it being possible for me to get away, will possibly see you again in a few days, and guess that is hitting the cushions some.

"And now, with very best wishes both from Frank and myself, believe me, Yours very truly, (sgd) H. L. Danberg. HFD-M P:S We are anxious to not take in a fourth party, as believe that we have arranged the financial end of it, providing we can make contracts at that end, so as not to receive any additional assistance."

Mr. Edwards: We offer this in evidence.

The Clerk: Defendant's Exhibit "G."

Q. By Mr. Edwards: You state there "We are anxious to not take in a fourth party." Who were the three already in that you mean by that?

A. Humphreys, Dodson and myself.

Q. And you did not want to take in a third party?

A. Yes.

Q. And you were all equal owners in the deal at that time?

A. Supposed to be.

(Testimony of H. F. Dangberg.)

Q. I will show you a letter dated March 22, 1913, and ask you if you wrote that letter and mailed it on or about the date it bears?

A. Yes, sir.

Mr. Edwards (reading):

"Minden, Nevada, March 22nd, 1913.

"Mr. J. C. Dodson, El Paso, Texas. Dear Jim: Have been expecting telegram from you for past two days, but have concluded that you are busy on deal and thus the reason, and so have wired you this morning, and to the effect that you wire me full particulars, as am figuring on going to San Francisco with Frank Monday or Tuesday.

"Now, I trust to hear from you, and to the effect that you have made the Lazy B deal along the lines that we had talked over. Also that from the conditions surrounding us here, that Frank and myself advice is to sell down as close as possible. Sell at least a couple of thousand more than we had figured on, providing you make the B deal, so that we will be absolutely in the clear at all times.

"The weather very cold and stormy, and note that Texas has had a storm also, and hope that it had no bad influence on conditions there.

"And now, trusting to hear from you by telegram and also letter with full details therein, believe me, Yours very truly, (sgd) H. F. Danberg—H.F.D-M."

Q. By Mr. Edwards: You speak of selling providing he made the Lazy B deal. You mean he was negotiating the contract to sell the cattle which you

(Testimony of H. F. Dangberg.)

were contemplating buying from the Lazy B people, and you told him to sell those providing he bought the Lazy B cattle. Is that correct?

A. Yes, sir.

Q. By Mr. Edwards: I show you a letter of April 21st, 1913, and ask you if you wrote that letter on or about the date it bears?

A. I did.

Mr. Edwards (reading): "Minden, Nevada, April 21st, 1913. Mr. J. C. Dodson, Lordsburg, N. M. Dear Jim: I have your letter of April 18th and the enclosure from the State Corporation Commission, and have referred same to Sweeney, as he must have slipped a cog some place in not attending to this special matter, but undoubtedly he will give it his attention and everything will be all right.

I note that you have a chance to buy two thousand cows but as Frank expects to leave here by the 7th of next month, and also after talking with him yesterday, am going to advise that you hold the said trades in abeyance, or take twenty days option with no payments, thus not binding yourself until Frank's arrival, as by that time we will be positive as to our cash reserves and our cash necessities in completing the deal; also that they cannot go much higher and can go lower. Your ideas as to keeping our own ranch stuff and filling it with other stuff is a very good suggestion, but as above set forth, hold it till Frank arrives.

"The draft for the automobile has not arrived as

(Testimony of H. F. Dangberg.)

yet but as before stated will attend to same upon its arrival."

"Nichols and Litch were up with Frank yesterday, and put up their thirty thousand, thus making some forty thousand dollars cash on hand; also that Frank is carrying twenty thousand and we are carrying twenty thousand additional for Company account, and the other people are ready to dig up an additional twenty thousand, so you see we will have one hundred thousand absolute to make the turn, and Frank has asked that we leave the ten thousand in Company account till we make the deliveries, and after we have made the said deliveries that the company would take over the automobile, and make the division of the ten thousand according to our understanding.

I see that you call the new car a hummer, and it will certainly be some pleasure over and above riding around in that rattly old Ford of dad's, nevertheless give him my best regards, and tell him to come up to Lake Tahoe this summer.

"Believe that Litch leaves here on the 25th and will be there to do as Harry dictates, which is the understanding, and you will find him good help.

"And now, with best wishes to yourself and wife, believe me, Yours very truly (sgd) H. F. Danberg, HFD-M."

Mr. Edwards: We offer that letter in evidence.

Mr. Wellborn: Objected to as immaterial and not proper cross-examination.

The Court: The objection is overruled.

(Testimony of H. F. Dangberg.)

The Clerk: Defendant's Exhibit "I."

Q. By Mr. Edwards: Who was the Dad that is referred to?

A. The man that drove the Ford machine.

Q. Owenby?

A. Yes, sir.

Q. He is the man that took you over the Lazy B ranch in 1913?

A. Yes, sir.

Q. The same man?

A. Yes, sir.

Q. I show you a letter April 22, 1913, addressed to Mr. Dodson, and ask you if you wrote that on or about the date it bears?

A. Yes, sir.

Mr. Edwards: (reading.) "Minden, Nevada, April 22nd, 1913. Mr. J. C. Dodson, Lordsburg, N. M. Dear Jim: Your letter with vouchers and monthly statement to hand today, and this is simply to acknowledge receipt of same.

"Also note in the El Paso papers that cattle prices are holding high, especially as the ranch people of Texas are requiring them for their own purposes, and believe that when Frank gets down there that you will make some more deals.

"And now, with best wishes, I am, Yours very truly, (sgd) H. F. Danberg, HFD-M."

Mr. Edwards: I offer that letter in evidence.

Mr. Wellborn: Objected to as immaterial and not cross-examination.

(Testimony of H. F. Dangberg.)

The Court: Overruled.

The Clerk: Defendant's Exhibit "J."

Q. By Mr. Edwards: I show you a letter dated April 3rd, 1913, and ask you if you wrote that letter and sent it on or about the date it bears?

A. Yes, sir.

Mr. Edwards: (Reading) "Minden, Nevada, April 3rd, 1913. Mr. J. C. Dodson, Lordsburg, N. M. Dear Jim: Your letter received, and the writer will take care of your draft of $385.00 whenever it may show.

"Note what you say as regards the condition of the cattle, and am somewhat surprised, as had expected them to be doing fine by this time, especially that the grass wuold naturally be good on account of the rains, but Frank expects to leave here in a few days and to be with you on the situation, and also to talk over the proposed deal, although believe we would make a mistake selling, even at this profit, unless there should be some good reason for so doing, my idea being to sell down to cost, but will abide by the decision of you and Frank. Also that it will be possible for me to be with you later on in the month.

"And now, with best wishes, and trusting to hear from you often as to the situation, believe me, Yours very truly, (Sgd) H. F. Danberg, HFD-M."

Mr. Edwards: We offer that letter in evidence.

The Clerk: Defendant's Exhibit "K."

Q. By Mr. Edwards: I show you a letter dated

(Testimony of H. F. Dangberg.)

March 2nd, 1913, and ask you if you wrote that letter on or about the date it bears?

A. Yes, sir.

Mr. Edwards: (Reading.) "Minden, Nevada, March 2nd, 1913. Mr. J. C. Dodson, El Paso, Texas. Dear Jim: Reached home yesterday, and have just telephoned Frank in Reno, he having arrived this morning. Also that we are to be in Carson together tomorrow to decide on the Lazy B matter. Just sent you a telegram, and which this is to confirm, "Take fifty thousand at least. More if necessary. Your judgment best, depending on B. deal. Frank meeting me Carson tomorrow. Will wire again," and trust that you will use your best judgment in the premises. Also that we will arrange for codes and will try to get three books so that we can do our telegraphing by code, thus to save expense.

"The weather conditions here are splendid, and the grass is almost as green as it is in New Mexico.

"We will look for your monthly statement in a few days so that we can get the books started; also that forgot to mention to you your cancelled check, which should have to put in with the incorporation papers, and which you understand.

"Frank went to see the James Boys, and they have taken over a large tract in California, thus making them impossible, and of which we are glad, as we will either bring in better people, or handle it among ourselves, and I am rather in favor of not cutting it up any more than we have at present, thus being better for us all, if we can arrange for the handling of same.

(Testimony of H. F. Dangberg.)

"And now, with best wishes, and trusting to hear from you often, also with full details as to what you have done at Santa Fe, and that you take plenty of time to make your selection, thus to get no poor land on the payroll. Yours very truly, H. F. Danberg, Sect., *H. C. Co.*. HFD-M."

Mr. Edwards: We offer this in evidence.

Q. I will ask you where you state here "I am rather in favor of not cutting it up any more than we have to at present, thus being better for us all." Whom do you refer to as "us all"?

A. The members of the company at that time.

Q. Dodson, yourself and Humphreys?

A. Yes.

Q. I want to ask you did you have an executive committee appointed by the Highland Cattle Company?

A. I don't believe we did.

Q. I will ask you if the powers of the president of the company as conferred by the by-laws of the Highland Cattle Company were as follows: "The president shall be the chief executive officer and head of the company, and in the recess of the board of directors and of the executive committee shall have general control and management of its business and affairs. He shall with the secretary sign all certificates of stock." That is correct?

A. I believe that is the wording.

Q. And the duties of the vice-president shall be "The vice-president shall be vested with all the powers

(Testimony of H. F. Dangberg.)

and shall perform all the duties of the president in his absence."

A. That is correct.

Q. The powers of the secretary are "The secretary shall be *ex-officio* clerk of the board of directors and of the standing committees. He shall attend all sessions of the board and shall record all votes and the minutes of all proceedings in a book to be kept for that purpose."

A. Yes, sir.

Q. When did Mr. Dodson cease to be vice-president and director of the Highland Cattle Company?

A. Sometime in May, right after our investigation when we found out that it was a crooked transaction. He resigned at that time.

Q. I will show you a telegram dated 3/26/13 and ask you if you received that telegram on or about the date it bears?

A. Yes, sir; that is correct.

Mr. Edwards: Telegram dated Lordsburg, New Mexico, 3/26. "H. F. Danberg, Minden. Closed deal with Lazy B. paid check twenty thousand made contract for sale of cows and steers subject to your approval will be Reno thirtieth March everything OK. J. C. Dodson." That sale of cows and steers was what was known as the Metzer—

A. Kidwell, Cadwell & Metzer.

Redirect Examination

By Mr. Sims:

I stated that according to the by-laws Dodson was to have a third of the stock, I a third of the stock and

(Testimony of H. F. Dangberg.)

Humphreys a third of the stock. Dodson never took up any of the stock or paid for it; none of the stock was every delivered to Dodson, it never went out of the stock book. The Wilson deal was a deal whereby—there were two Wilson deals. One was the Wilson deal originally before we organized the Highland Cattle Company in 1912, I believe it was the month of November or December, that was a deal whereby we were buying from Wilson a certain number of head of cattle at $25.00 per head; that is where Dodson bought personally from Wilson. On the 20th day of November, 1912, in El Paso, I assumed part of that contract. It eventually turned out to be the Robinson contract and not the Wilson contract. He switched one contract for the other. I did not think I was taking over one-half of the Wilson contract; that was the Robinson contract, I found out afterwards that the Wilson contract was merged into the Robinson contract. In my opinion, along in March, 1913, what was known as stock cattle, such as Lazy B cattle, including cows, heifers and steers, I figured they were worth $27.00 or $28.00 from the best information that I received. At the time I received the letter in which Dodson suggested selling the cattle close, we had other cattle besides the Lazy B cattle. We had the cattle that came in under the Robinson-Wilson deal. It was said to sell close if we trimmed the entire herd, if we owned the Lazy B. I am familiar with the by-laws of the company. Article 12 provides: "Powers of directors: The board of directors shall have the management of the business of the company and may, sub-

(Testimony of H. F. Dangberg.)

ject to the provisions of the statute, of the charter and of these by-laws, exercise all such powers and do all such things as may be exercised or done by the corporation." Article 33. "General superintendent and manager. There shall be elected by the board of directors at their annual meeting or at any meeting thereof a general superintendent and manager of the corporation who shall office at the pleasure of the board of directors. His duties will be of a general supervising nature. He shall make a monthly report to the board of directors or at such times as they may call on him for one, and shall be subject to the orders of the board and shall receive such salary as the board of directors may fix. The general manager shall have power to employ and *s*ischarge employes whenever the interests of the corporation so demand." We never carried out the provision appointing a general superintendent and manager, nor an executive committee—no salary had been agreed upon for Mr. Dodson.

Re-Cross Examination by Mr. Edwards:

It has since developed that Mr. Dodson did not give his entire time to the affairs of the Highland Cattle Company. We imagined he was giving most of his time. His family lived in Oregon, at times he went there; in some cases it is a business to have a family. He has no other business that I know of.

Re-Direct Examination by Mr. Sims:

I meant that he sometimes left there and went to Oregon. It took several weeks to go there and back.

I did not draw any salary as secretary of the Highland Cattle Company, nor did Mr. Humphreys draw

(Testimony of H. F. Dangberg.)

any salary as president. Dodson drew some money down, but not as his salary, we charged it to his account. Salaries were not agreed upon; the company was not old enough; we were going to agree on that later on. We were not running as a partnership at that time, but as a corporation.

F. E. HUMPHREY, a witness called on behalf of plaintiff, testified on direct examination as follows:

My name is Frank Humphrey. I have resided in Reno, Nevada, about twenty years and am engaged in farming and cattle raising. I am now, and have been since the incorporation of the Highland Cattle Company, the president of the company. I know J. C. Dodson. I had a conversation with him about the middle of February, 1913, part of which took place at Lordsburg and part at Duncan. Dodson, Danberg and myself were present at the beginning of the conversation. Dodson told me he could buy the "Lazy Bee" cattle at $27.00 per head, and all the lands and calves from October, all suckling calves thrown in, in the bargain, stating that he could get terms upon these cattle. We then went to Duncan, Arizona, to see Foster. When we arrived Dodson said we would be unable to see Foster so we returned to Lordsburg. I first saw the contract known as the spurious contract (Plaintiff's Exhibit 3) about the 20th day of March, 1913, at the Overland Hotel, Reno, Nevada; Danberg, Dodson and myself were present when it was handed to me—(defendant objected to the question asked witness by plaintiff as to what, if anything, Dod-

(Testimony of F. E. Humphrey.)

son said relative to said contract, which objection was sustained by the court, whereupon plaintiff duly excepted to the court's ruling)—on the 24th day of March, 1913, an agreement was executed for the sale of certain cattle in which parties named were designated as J. C. Dodson, manager of the Highland Cattle Company, as seller, and J. G. Kidwell, as buyer. We never knew of this contract until later on. When I arrived down there in May, I did not know that it even existed. The draft drawn on the Highland Cattle Company in favor of A. C. Wilson, paid February 1st, was talked over by myself and Dodson and was drawn under my instructions.

Cross-Examination

By Mr. Edwards:

Q. Mr. Humphrey, did the Highland Cattle Company hold any meeting of its directors between the time that it held this meeting at the time of its incorporation in January, 1913, and the time you held a directors" meeting down in Lordsburg in May of 1913?

A. I don't think we held any meeting.

Q. You don't think you held any between the middle of January, 1913, and the last of May, 1913?

A. No. Possibly we held one meeting.

Q. Your minutes here would show that, wouldn't they?

A. I should think they would.

Mr. Edwards: Have you those minutes here? While Mr. Sims is ascertaining that, I will take up another line of inquiry.

(Testimony of F. E. Humphrey.)

Q. I show you a letter dated February 28, 1913. State whether you wrote that letter and transmitted it through the mails to Mr. Dodson on or about the date it bears.

The Court: It will probably be necessary, Mr. Edwards, to read the letter. That is not already in.

Q. By Mr. Edwards: That is your writing and signature, you wrote that letter, did you not? (Handing letter to the witness.)

A. Yes, sir.

Mr. Edwards: I am going to read—Your handwriting is not very legible. If you will hold that, and I will read a copy. If I make an error, you call my attention to it. (Reading:)

"San Francisco, Cal., Feb. 28, 1913.

Friend Jim:

I received your telegram and will be in Reno and get your letter explaining about Lazy Bee, and we did not let the Graves Bros. in as they are on some big trade on some land in Calif. somewhere, and did not know right now whether they could handle this or not, etc., and I told them we would not hold any longer for them so they wouldn't be in it at all so when I go to Reno will figure out whether we can handle the Lazy Bee or not. Of course if we could sell them all it would be wise to get their land and make a better plant of it for to run cattle and grow them up and if there is any way we can pull it of we will try and do it. If we can't arrange sale as we receive the stuff we could make it all right and hold onto what we

(Testimony of F. E. Humphrey.)

have money to put into it without borrowing more than we have now. Of course we may take some other strong man in with us and put it over. At any rate, when I get to Reno will advise you what I think better do. Fred is going up tonight and I will go up tomorrow night.

Yours respectfully,
F. E. HUMPHREY."

Mr. Sims: What is the date of that?

Mr. Edwards: February 28, 1913. We offer this in evidence as Defendant's Exhibit ....

The Court: What is the number of the exhibit?

The Clerk: Defendant's Exhibit N.

Q. By Mr. Edwards: I will ask you, where you refer in the letter—"Of course we may take some other strong man in with us," who did you refer to by that "us"?

A. Mr. Dangerg and myself.

Q. And Humphrey and Dodson?

A. Well, not necessarily, no.

Q. What is that?

A. Not necessarily; I wasn't including him at that time.

Q. You didn't consider him as being concerned with that at that time?

A. He was concerned, but he had not showed us where he put up his money in this corporation yet.

Q. Didn't you at the time you wrote that letter consider he was with you and Mr. Danberg equally at that time?

(Testimony of F. E. Humphrey.)

A. No, I did not. I considered he was just working on these trades down there and corresponding with us.

Q. You heard Mr. Danberg's testimony yesterday, did you not?

A. Yes, sir.

Q. You heard me ask him when he said, "We don't want to take in a fourth party" that the other three he considered when he wrote that was himself and you and Mr. Dodson?

A. Yes, I remember that.

Q. Was your idea as to whether Dodson was in on the deal at that time different from Mr. Danberg?

A. Well, I was never satisfied with his not coming up with his return voucher of $20,000, showing us where he was an interested party in this concern at all times until he come up to his agreement.

Q. Have you the letter that is referred to here as being received from Mr. Dodson, explaining about the Lazy B deal?

A. No, I don't think I have; it might possibly be amongst those papers; I don't know.

Mr. Edwards: Have you that letter? He starts out in his letter, "I received your telegram and will be in Reno and get your letter evplaining about Lazy Bee—"

Mr. Sims: No, I have no telegram.

Mr. Edwards: It is a letter.

Mr. Sims: From Dodson to Humphrey?

Mr. Edwards: Yes, explaining about the Lazy B deal.

(Testimony of F. E. Humphrey.)

Mr. Sims: I will have to ask Mr. Danberg. Mr. Danberg will you please step forward? I have seen no letter addressed to Dodson—oh, yes; I have that letter here. You mean under date of—

Mr. Edwards: It would be approximately under date of February 28, 1913.

Mr. Sims: It is February 26; this is the one I showed you yesterday.

Mr. Edwards: Oh, that was the letter that was offered in evidence?

Mr. Sims: No, the one written to Danberg was offered in evidence.

Q. By Mr. Edwards: Did I understand you to say that Dodson informed you that the Lazy B people were going to throw in all their land for nothing?

A. Yes, sir.

Q. Did you know how many acres of land they held at that time?

A. No; I didn't know how many acres particularly they said they had about a thousand acres of land.

Q. Didn't you know that thousand acres of land was worth about $50,000, alone?

A. No, sir. In the average of ranch lands down there, when you run about 35 to 50 cattle on an acre, they wouldn't be worth that much.

Q. How much of that land was cultivated, did you know?

A. There was no cultivated land that I know of. There was some little orchard farm down about Duncan that I didn't know about.

(Testimony of F. E. Humphrey.)

Q. You didn't know that 300 acres of that was under water and cultivation?

A. No, sir.

Q. Did you know that the price of cultivated land and land under water was $100 an acre?

Mr. Sims: That is objected to as immaterial; I don't know what the value of land has got to do in this case.

Mr. Edwards: It is cross-examination. Will you read the question Mr. Reporter.

(Last question read by the reporter.)

A. I never heard of any hundred dollars an acre where we were.

Q. What is that?

A. I didn't hear of any such land of the value of a hundred dollars an acre.

Q. Will you state that it did not have that value at that time?

A. Not the lands that he spoke to us about.

Q. Did you ever go over any of the Lazy B ranch prior to March 25, 1913?

A. Just went along the road where he showed us two or three mills that belonged to them, out on this plateau or mesa, as they call it, when we went through to see Mr. Foster, as I said before, on the way he pointed out these mills and says: "Those are the holdings of the Foster and Day people."

Q. You made no effort to go over the ranch itself?

A. No, because we didn't consider the ranch of any particular value at that time. We didn't know anything about it. We were buying the cattle.

(Testimony of F. E. Humphrey.)

Q. Didn't you at that time state to Mr. Dodson that the reason that you didn't want to take the deal up directly with Foster was because Dodson had commenced the deal and you thought it was better for him to go on through with it?

A. I stated to Mr. Dodson I wanted to talk to Foster myself. In such a sized deal as that, it was a large transaction, and I wanted to know all the details.

Q. All right. Did you ever make any further effort to see Mr. Foster?

A. Never did. Because I left there and came back to Nevada shortly afterwards, and he said he would be in bed for sometime, he was an old man and he didn't want to disturb him, and therefore I had no chance under the circumstances.

Q. You never made any further effort to see him?

A. Never went down there again until in May.

Q. In May, after the deal was closed.

A. After the deal was closed.

Q. At the time the Highland Cattle Company was endeavoring to get control of a large section of the range in there, several ranches, were they not?

A. Well, not particularly, no; they had all of these few bunches of cattle there; they was just trading around a little, up in the country, as I could see.

Q. Now, you say you were trading around a little. You made a deal with the Wilson people, did you not?

A. Well, we had a deal with the Wilson people that was made by Dodson away along before that we were paying on the cattle.

(Testimony of F. E. Humphrey.)

Q. How many head of cattle did that Wilson deal involve?

A. Well, I think there was about twelve or fifteen hundred cattle.

Q. Twelve or fifteen hundred cattle. The Robson deal, you were making a Robson deal there at or about this time, were you not?

A. Yes, the Robson deal—

Q. How many head of cattle did that involve?

A. There were supposed to be about 2500 head of cattle.

Q. 2500 head of cattle, this is fifty or sixty thousand dollars worth of cattle, is it not?

A. Somewhere about that.

Q. Do you call that a little deal?

A. $25 a head was supposed to be the common price, and 2500 head of cattle would be over $60,000.

Q. You would consider that a small deal?

A. I don't know what you call it, whether it was small or large.

Q. You say you had some small deals on there. I wanted to find out what you meant by a small deal.

A. It was not a large deal.

Q. You were dealing with Kidwell and—somebody else—Metzer, weren't you?

A. I was not.

Q. Mr. Dodson was, for the Highland Cattle Company?

A. He did at any rate.

Q. By Mr. Edwards: I show you two documents purporting to be contracts entered into on the 24th

(Testimony of F. E. Humphrey.)

day of March, 1913, by and between J. C. Dodson, manager, Highland Cattle Company, Lordsburg, New Mexico, hereinafter known as the seller, and J. G. Kidwell, hereinafter known as the buyer, acting as agents for Kidwell and Caswell of Portland, Oregon, and ask you if that contract was entered into by Mr. Dodson in behalf of the Highland Cattle Company, or purporting to be in behalf of them on or about that date? (Handing paper to the witness.)

The Court: Assuming that is a correct copy.

Mr. Edwards: Yes, assuming that is a correct copy.

The Witness: You mean that this a correct copy of what was produced afterwards?

Q. By Mr. Edwards: Yes.

A. I think so; I have no doubt that it was correctly copied.

Mr. Edwards: This contract, Your Honor, I will read part of it and offer the whole in evidence (reading):

"This agreement made and entered into this 24 day of March, March, 1913, by and between J. C. Dodson, Mgr. Highland Cattle Co., Lordsburg, N. M., hereinafter known as the seller, and J. G. Kidwell, hereinafter known as the buyer, acting as *gants* for Kidwell & Caswell of Portland, Oregon.

"Witnesseth as follows: For and in consideration of the sum of $7000; $28 per head for yearling steers and about ½ 2's.

$40 per head for 2 year old steers and about ½ 3's and up.

$40 per head for 3 yr. old steers and

(Testimony of F. E. Humphrey.)

$40 per head for 4 year old steers and up.....

The seller agrees to sell and deliver f. o. b. cars at Lordsburg, N. M. Station, on the Southern Pacific Railroad, on or about June 15, 1913, fifteen hundred head of yearling steers, all to be full ages, June 1st, and to be buyers cut out of entire herd of sellers, consisting of about 3000 head on or about 600 head of steers, ages from 2's and up, all 2 yr. old steers to be full ages by June 1st, 1913, all of the above described cattle to be delivered in good shipping condition at the above named station and all to be in the following original brands, to-wit"—and so forth. And signed—I won't read all of it unless you care. (Continuing reading:) "Witness our hands this 24 day of March, 1913. J. C. Dodson, manager Highland Cattle Company.

Kidwell & Caswell, by James G. Kidwell."

Mr. Edwards: I was looking for those particular copies, Your Honor. We don't seem to have any copies of those drafts, although we know they are in existence. I want to show him these payments made to Dodson by Kidwell & Caswell. You are making no objections to the fact it is not the original?

Mr. Sims: No.

Q. By Mr. Edwards: I show you what purports to be a true copy of a draft dated February 15th, 1913, and I ask you if you know anything about that draft being presented for $20,000?

A. That draft, I am sure, was written when we were in Lordsburg.

(Testimony of F. E. Humphrey.)

Q. This draft reads, "Highland Cattle Company, February 15th, 1915. Pay to the order of O. C. Wilson, $20,000. Signed, J. C. Dodson, buyer." And it shows endorsement, "Paid February 26th, 1913." Was that draft drawn by Mr. Dodson for the payment of cattle purchased by him for the Highland Cattle Company?

A. That was a payment on a trade that he had purchased for J. C. Dodson, and we paid for the cattle.

Q. You paid for the cattle?

A. That is, we paid—he drew—we were down to Lordsburg at that time, and we mailed a check back—he drew a draft there to O. C. Wilson, and I mailed a check back up to meet the draft.

Q. It was paid by the Highland Cattle Company, was it not?

A. Yes, it was paid by the Highland Cattle Company.

Q. And for the benefit of the Highland Cattle Company?

A. Yes, the cattle were turned over to the Highland Cattle Company.

Q. The cattle were all bought by Mr. Dodson for the Highland Cattle Company?

A. No they were not bought in the first place, by Mr. Dodson. They were bought for himself, and they were *were* afterwards turned over to the Highland Cattle Company. The contract reads from O. C. Wilson to J. C. Dodson, cattle purchased. The original contract says a thousand dollars, if I remember right,

(Testimony of F. E. Humphrey.)

on October the 28th, long before these cattle were purchased.

Q. And then the Highland Cattle Company were buying a half interest in that contract?

A. No, they were paying for all the cattle.

Q. They were paying for the cattle?

A. They were paying for the cattle, yes.

Mr. Edwards: We offer that in evidence.

Mr. Sims: We object to that; on the face it says J. C. Dodson. The Highland Cattle Company is not connected with it in any way.

Q. By Mr. Edwards: I show you what purports to be a check, dated "Lordsburg, New Mexico, March 24, 1913. At sight pay to J. C. Dodson, or order, $9000. Signed, Kidwell & Caswell." And endorsed on the back of that— Was this the personal one that Dodson got?

Mr. Danberg: That was a true copy, he took them in his own name.

Q. By Mr. Edwards: Did he endorse it over to you people, or give you a new one of his own?

A. This is not—we received no draft from those people, the check from Kidwell & Caswell.

Q. Dodson turned over $9000 to you, however, that purported to come from these people?

A. He reported that it came from these people and gave us his personal check. The checks he had received from them he had taken in his personal name.

Q. I show you a document which purports to be a bill of sale, or advice of sale, signed O. C. Wilson, seller, dated February 15, 1913, signed J. C. Dodson,

(Testimony of F. E. Humphrey.)

buyer, and ask you if that advice was sent to the corporation on or about the date it bears?

A. I don't remember that. Probably the advice was there, if I just remembered it—

The Court: Talk a little louder please.

A. I don't remember that particular advice, but it may be there; it may have been paid to O. C. Wilson, $20,000.

Q. By Mr. Edwards: $20,000 for cattle—

A. That is the time I mention we were down there.

Mr. Edwards: Yes. We call for the original of this. I wanted to show that corporation did receive that. Would you admit that?

Mr. Sims: That the corporation receive it?

Mr. Edwards: Yes.

Mr. Sims: Mr. Danberg will testify to that. This witness lived away from the office of the Highland Cattle Company at Minden.

Mr. Edwards: He was president of it, and it is one of the corporation's records.

Mr. Sims: We have the originals here.

Mr. Edwards: Would you admit that this was received by the corporation?

Mr. Sims: Yes, that it was received by Danberg, secretary of the corporation.

Mr. Edwards: We will offer this in evidence. We will read it. It is on a form. (Reading:)

"Highland Cattle Company, Minden, Nevada.

We offer that in evidence as Defendant's Exhibit—

The Clerk: Defendant's Exhibit Q.

(Testimony of F. E. Humphrey.)

Mr. Sims: Same objection, if Your Honor please.

The Court: I don't see the materiality of it myself.

Mr. Edwards: Why, it shows that a purchase of $20,000 of cattle by Dodson as buyer of the Highland Cattle Company.

The Court: It does not say so.

Mr. Edwards: Why, it is on their—it shows on the form of the advice, headed, "Highland Cattle Company." I think Your Honor had better look at that document. (Handing document to the court.)

Mr. Sims: It purports to be Dodson, buyer. As testified by this witness, he had bought these cattle in his own name away back in October, 1912, and afterwards turned them over to the Highland Cattle Company.

The Court: Objection sustained.

Mr. Edwards: We would like to have that marked for identification, Your Honor.

The Clerk: This is "Q" for identification.

Mr. Edwards: I think that is all.

Redirect Examination

By Mr. Sims:

The following letter dated Februaary 26, 1913, addressed to me and written by Mr. Dodson is in Mr. Dodson's handwriting and signed by him:

"February 26th, 1913.

Mr. F. E. Humphrey.

Friend Frank:—I saw the Lazy B man; can trade on the lines you mapped out. Can sell and he will

(Testimony of F. E. Humphrey.)

take money at loading time up to June 1st, then will have to make a second payment. He thinks can let $75,000 stand for a year, isn't positive yet, but thinks at least $50,000 could let stand. I also found he had a contract for lease on seven sections absolute lease on 5 sec. and had bought 3 sec. of the land out where we were figuring on leasing. Also he was getting it at 3 cents an acre."

It is a fact that the Robson deal was made direct with Dobson in the year 1912, October or November; it was made personally between Dodson and Robson, when the Highland Cattle Company was incorporated, it took over the transaction.

I authorized the draft Mr. Edwards showed me that I stated was made in Lordsburg at the time I was there, along the middle of February; I cannot say whether it was made in my presence, I have forgotten that. Mr. Dodson stated that he would have to pay O. C. Wilson $20,000 right away, and I told him to go ahead and draw a draft for $20,000 to Wilson as he had to go somewhere to meet him. It was not done right there; it was done in Silver City. He had to go there to make this payment on the cattle in order to get possession of the cattle and I mailed the check from Lordsburg to Minden, Nevada, to meet this draft when it got up there, as we both, Mr. Danberg and myself, were in Lordsburg at the time looking over things.

Q. By Mr. Sims: At the time you ordered this draft honored, what was your belief as to the correct-

(Testimony of F. E. Humphrey.)

ness of that—what was your belief that $20,000 was paid for?

Mr. Edwards: One moment. With all due respect to the court, we object to that as incompetent, irrelevant and immaterial and *here*say testimony.

Q. By the Court: Did you have anything to do with paying this $20,000 draft—you may object or except to any of the questions you want to.

A. No. Mr. Dangberg paid the draft.

Q. Did you know at the time it was paid that it was going to be paid?

A. I knew it.

Q. You knew it, and as president of the company, consented to it?

A. Yes.

Q. At the time it was paid did you believe that the contract that Dodson had entered into was the contract set out in paragraph 7 of the complaint—What is the number of the exhibit there?

Mr. Edwards: Exhibit I I think is the first thing they introduced.

Mr. Sims: Exhibit 1 is what is known as the spurious contract.

Mr. Wellborn: Paragraph 7 of the complaint.

The Clerk: It is Exhibit 3.

Q. By the Court: Did you believe that Exhibit 3 was the contract entered into between the Highland Cattle Company and Day and Day and Foster concerning this deal?

A. I did.

(Testimony of F. E. Humphrey.)

Mr. Edwards: Are you through with the question, Your Honor?

The Court: Yes.

Mr. Edwards: We object to that as incompetent, irrelevant and immaterial, and not binding on the defendants, as this belief was not communicated to them, or they had no knowledge; that the officers of the company had no knowledge that any contract other than the genuine one.

The Court: Objection overruled.

Mr. Sims: Did you answer the question?

The Court: He answered the question yes?

(Last question read by the reporter.)

Mr. Edwards: I move the answer be stricken out on the same ground.

The Court: The motion will be denied. Now, anything else?

Q. By Mr. Edwards: They spoke to you about the $20,000 draft drawn on the Highland Cattle Company in the Wilson deal? Prior to that there was a $10,000 draft drawn on you, on the Highland Cattle Company by virtue of this same deal, was there not, about February 1st?

A. Yes, sir.

Q. And that was paid by the Highland Cattle Company?

A. That draft was talked over by myself and Mr. Dodson in Reno, Nevada, that he would have to make a payment of $10,000 on these cattle. I gave him a blank draft to draw in favor of O. C. Wilson,

(Testimony of F. E. Humphrey.)

and he sent us receipts, and so forth, for this money.

Q. This draft was drawn by Dodson, was it not, on the Highland Cattle Company?

A. It was drawn by Dodson under instruction by me.

Mr. Edwards: All right, that is all.

Mr. Sims: That is all.

The Court: Stand down. We will take a recess of five minutes.

(Recess.)

Mr. Edwards: There was just one question we overlooked asking Mr. Humphrey, and would counsel give me leave to introduce a copy of the printed form?

The Court: When you get the original, you can put it in.

Mr. Edwards: I wanted to speak of it at this time, so I would not waive my right to ask the witness.

H. L. NICHOLS, a witness called on behalf of plaintiff, being first duly sworn, testified on

Direct Examination

as follows:

My name is H. L. Nochols. I reside at Reno, Nevada, and am engaged in the butcher business. I know the Highland Cattle Company. I remember going to Duncan with Mr. Foster and one of the defendants, Mr. Dangberg, and Mr. Sims, about the 26th day of May, 1915, and I was present during a conversation of Mr. Foster, the cashier, Mr. Dang-

(Testimony of H. L. Nichols.)

berg and myself. We compared the carbon copy we had with us with the copy we found in escrow in the bank and in going over it we saw that it was a different copy.

Mr. Foster stated that the one in the bank was the one he signed.

Q. Did he state with regard to ever having signed any other contract?

A. Yes, he stated he did not sign any other. Mr. Dangberg and Mr. Sims then stated that they would repudiate the contract and ask for the return of the money.

Q. You seem to have an interest in this thing, did you at that time?

A. I was a stockholder, yes.

Q. In this Cattle Company?

A. Yes, sir.

H. F. DANBERG, recalled by the plaintiff, testified as follows, to-wit:

At the time I paid the draft of $20,000 drawn by Dodson in favor of Day and Foster, it was paid out upon the advice which corresponded with his carbon copy of contract, and I believed the carbon contract was the contract upon which the money was paid.

S. A. FOSTER, a witness called on behalf of the defendant, being duly sworn, on

Direct Examination

testified as follows:

I reside at Duncan, Arizona, and have been en-

(Testimony of S. A. Foster.)

gaged in cattle raising and farming for about eight years. I was one of the partners of the firm of Day and Foster. As to the extent of real estate that was owned by Day and Foster on the 23rd or 25th day of March, 1913, I think the deeds called for something over 1,000 acres and we control a country about 20 miles each way, I guess, that runs up and down the Gila River north and south, to a big range of mountains that is supposed to be the dividing line between the ranches. Our ranch extends about twenty miles along the Gila River. The cultivated land of the ranch is separate from the cattle business; it all went into this deal—we have something like 300 acres under the ditches. There are two ditches on the north and south of the Gila. The names of the ranches we were going to convey to the Highland Cattle Company were the "Home Ranch" in Arizona, through which the Gila runs and contains 280 acres on that piece. The river runs through it and it is divided into three tracts; the New Mexico land, we count that two ranches, but since then we have sold it into one and sold all the real estate on the north of the river in New Mexico. That was since 1913; and we owned a river front that we use in New Mexico. I guess it is about a mile and a half along the river. That consists of about 300 and some odd acres of land. We have a ranch that we call the "Cottonwood," east and a little south of the river. Those are the cattle ranches; there is 80 acres of that; and then we have lot four which is still on east of that, and away up into what we call

(Testimony of S. A. Foster.)

White Rock. There is 40 acres of deeded land of that. The east ranch is where one of our men lives and we have 40 acres of land there. It has two big pastures. West of that we have another ranch with three big windmills on it, and there is 40 acres of deeded land and a big windmill and gasoline engine. There is two big pastures there. Then we have some state land east of that place—two sections, I believe —and applications for some more. The ranches were all improved. As to the reasonable market value of our ranch property on or about the 23rd day of March, 1913, the farming land is generally known to be worth about $100 an acre unimproved, that is just under cultivation. $50,000.00 is what it was put in at and it was very cheap, as we consider it; its reasonable market value at that time. I have been engaged in the business of mostly raising and selling cattle for a number of years. I am familiar with the market price of range cattle on the 23rd of March, 1913, in Arizona; the market value was $30 and $50 for calves. I remember meeting J. C. Dodson sometime in December, 1912. Lordsburg was where I first met him. He wanted to get prices on the Lazy B ranch. He wanted to buy us out—buy the cattle and ranches. He said they were forming the Highland Land and Cattle Company. I don't know as there was very much more said at that time. He wanted our outfit and wanted to get control. He said they were anxious to control all the country around to Lordsburg and wanted to buy our outfit out.

(Testimony of S. A. Foster.)

Our cattle ranged away as far as sixty or seventy-five miles—they drifted that way but we drive them back home every time we catch them. That country is known as the open range. We control the water and the cattle run over the government land; whenever you put down a well you have to protect it by deeded land. I again met Dodson about the 15th of February, 1913, when he came to Duncan. He came to Duncan and came out home with me. I had a conversation with him at that time. I guess he and I were the only two that were together that afternoon, but I took him up to my ranch, and my brother, and Mr. Dodson wanted to look over the outfit. This was about the 15th of February as well as I remember. Mr. Dodson said he was buying for the Highland Cattle Company. He wanted me to set a price on the outfit. I had talked with Frank Coon at Lordsburg and told him that I would show Dodson the outfit when he came down. When he came down I took him out home with me and the next day we went up to what we called the Gila, up the river, in a buggy. I showed him the real estate in New Mexico and as we came down the river I showed him the Arizona ranches, and before we got home he said, "I think you are a little high on the outfit." I says, "You have not seen it all." I told him the price was $50,000 for the ranches and real estate—the cattle ranches. And $200,000 for the cattle. So the next morning we took a horse each, and went on the range, what we call south of Duncan, and through our mountain country and in by the horse

(Testimony of S. A. Foster.)

camp, which was another ranch we had, and went on to a neighbor of ours by the name of Pierson and stayed all night, and went in on the Lordsburg south of the High Lonesome Ranch. That is one of the ranches that I spoke of having the 20-foot mill on it. We went on into Lordsburg and Dodson and I were there for awhile and he said to me, "We had better get together. I have got to get away We will put that proposition up to Mr. Day and can handle the outfit at the price you mention." That is, $50,000 for the ranches. Mr. Day is my partner. And I told him then—at that time he wanted to know if Mr. Day would take a mortgage on the outfit at $75,000, and I wrote to Mr. Day and he wrote back and said yes, he would take a mortgage on the outfit at $75,000 at 8 per cent interest. But before the mortgage was to be drawn up he wanted to be in Arizona to see the way the mortgage would be drawn. At that time we gave Dodson the choice on the trade, either to tally the cattle or lump the cattle off at $200,000, and $50,000 for the ranches. I put that proposition before Mr. Day and he told me that he was willing to go ahead and do that and take this mortgage on the outfit at $75,000. Then, I think it was—it was the day before the contract was drawn up that I got a telegram from Mr. Dodson that he would meet me at Duncan next day. In the conversation I had with Mr. Dodson at the time he came down and looked over our ranch he said he was manager of the outfit, the Highland Cattle Company. He came back and went away and I don't

(Testimony of S. A. Foster.)

know where he went to, but he was not around Duncan any more till the 24th or 25th of March when the contract was drawn. He sent me a telegram the day before. I met him in Duncan the next day at the train. I met him at the train, and he said, "I have come down to fix up that contract on those cattle." I says, "You will have to wait untill Mr. Day gets here." And I explained to *to* him the same reason that I did just now, that Mr. Day would take a mortgage on the outfit for $75,000. Well, he says, "There is no use to do that. We have arranged for cheaper money than 8 per cent, and we don't want to give a mortgage on the outfit. It will be all cash on the 20th of June," when I believe the rest of the money was due. Then the question came up as to how he was to receive, whether tallying or lump in trade. He said he had been over the ranch and knew enough to take it at a lumping trade for $200,000 for the cattle and $50,000 for the ranches. After we talked over the trade we had *l*anneau draw up the papers. At the time we went to the bank we went in there to ask Lanneau if he would draw up the papers on this contract that he did draw up. Mr. Dodson said at the time that he was buying for the Highland Cattle Company and signed the papers as manager of the Highland Cattle Company—he said he was manager of the Highland Cattle Company, there in the bank. We outlined the terms there in the bank, and so he made a remark there again about this money, and he says: "We will take the lumping trade at $200,000 for the

(Testimony of S. A. Foster.)

cattle and $50,000 for the ranches." And as Lanneau outlined it down, it went down to where it says "Bill of sale for all the cattle of a certain brand," he says, "What number will you put in?" I said, "There is no need of putting any number." And he said, "How many will you guarantee?" I said we wouldn't guarantee any. "If we did, you would have to pay for what came over the $200,000." He says, "I want our men to know what we are getting." I made the remark that we would put in 7000 cattle, more or less." He said, "All right." The deed called for a thousand acres of land, more or less, and at that time we had about 90 head of horses, and I said "90 head of horses, more or less," and the contract was drawn up in that form, and I signed it for Day and Foster and he signed it for the Highland Cattle Company, "J. C. Dodson," as manager. That was document purporting to be contract (Defendants' Exhibit "R.") The bill of sale (Defendants' Exhibit "S") referred to in said contract, was drawn up by us and was executed on or about the date it bears. These contracts were drawn up by B. R. Lanneau, who is a banker in Duncan. The bill of sale I think refers to cattle only by the brand. All the cattle branded as the Lazy B. The major portion of our cattle were branded Lazy B. "W. I. C." on the left side, and Z-bar L on the shoulder, and there is a Z on the shoulder and bar on the side and L on the hip. That constituted most of our cattle. We only kept up the one brand. The increase or calves of these other cattle we put the Lazy B on.

(Testimony of S. A. Foster.)

This bill of sale covers all the cattle owned by Day and Foster on that day. Mr. Dodson read over the contract at the time he drew it up and helped dictate the contents. Mr. Lanneau made two carbons of the contract, he gave me one and Dodson one and kept this one in escrow to stay there till the rest of the money was paid over. I don't think that the other two carbons were signed by the parties—we just signed this one.

The question came up as to the first payment, and I objected to the $20,000 and told him that anyway he ought to pay $25,000. He said he had only arranged for $20,000 but that the other would be due soon and that I would still have possession of the outfit till the rest of the money was paid, and also he arranged for me to go ahead and he would pay me $75,000 a month. He gave me a draft of $20,000 after we went to the bank, on the Highland Cattle Company, signed J. C. Dodson, manager. That is the draft in evidence I suppose. I received that money.

I did not see Dodson again till I went to Lordsburg, when they were gathering the cattle about the 15th day of May, 1913, at that time he wanted me to help Roberds work the range and gather those cows that he sold to Metzel. He told me that he had sold some of the Lazy B cattle to Metzel. He made a contract with the Kidwell and Metzel outfit, or represented to me that he sold 4500 head. I went over to Lordsburg with a bunch of horses. When I got over to Lordsburg some of the boys came to

(Testimony of S. A. Foster.)

me and said they were branding these B calves with the Box M brand. That was the Highland Cattle Company's brand at that time. I went to Roberds, who was the ranch foreman, the man who works on the range—for the Highland Cattle Company. I told Mr. Roberds "There is some mistake someway about your branding the B calves with the Box M." He said: "There will not be many here today and we will not brand them, and you can go and see Dodson." So they didn't brand the calves that day, and I went to town and saw Mr. Dodson and I said: "Mr. Dodson, Roberds misunderstood you some way or another. This B brand is to be up till you pay the $230,000." Dodson says: "Yes, he misunderstood me. We will have no more of them branded with the Box M brand." So I worked on with the wagon and we got through working at Lordsburg and moved on to what they call Adobe, where they were camped, but it was Hackberry where there was a lot of cattle. And then we went to one of our mountain ranches about 12 miles or 14 miles from Adobe, and when he got over there we rounded up at the horse camp, and the next morning about daylight, Joe Olney brought me a note. He wanted me to get to Duncan before they did. That is, Mr. Dodson wanted me to, and to change that contract so as to read guaranteeing 9000 instead of 7000 more or less. So that Roberds and the cowboys that were going back to Adobe, which is the ranch that the Highland Cattle Company owned. I helped brand some calves that were going to the river north of

(Testimony of S. A. Foster.)

there, and I went to Duncan about between 2 and 3 o'clock to meet the Highland Cattle Company outfit and also Mr. Dodson. He mentioned Humphrey and Dangberg that were coming to Duncan the next day. I got to Duncan and there was nobody there, but Dodson had left word, or sent word over the phone to the bankers to bring me to Lordsburg. So we went up to Lordsburg that night and met Dodson this side of Lordsburg. I asked him what was doing, and he says, "I can square myself with $30,000," and he said "I wouldn't ask you to change that contract, but if you will stand good for $30,000 I can square myself with the Highland Cattle Company." I told him I wouldn't do that any more than I would change the contract. Then Dodson got into the car and rode up with Lanneau and myself and got off the car and I didn't see him any more till the next day or the next. That was when the Highland Cattle Company had taken over the outfit.

I went back to Lordsburg the next day and was talking to Mr. Humphrey and Mr. Dangberg. And they were going to ship these cattle there either that day or next day and I told them that there was something misunderstood about the contract and that we wanted the money in the bank before these cattle were shipped, and they said they thought they would get loose from shipping any of the cattle, and after they got loose from Mr. Metzel, that is when they wanted me to pay back the $20,000. They didn't ask me that day at Lordsburg to pay back the $20,000. They didn't say anything about Dodson's authority.

(Testimony of S. A. Foster.)

I don't know exactly which one I was talking to, but there was one of them took out the herd of cattle that day and was trying to settle with Metzel. It was either Mr. Humphrey or Mr. Dangberg that was talking to me. Outside of Dodson those were the only ones that I knew. This conversation took place about May 23, 1913. No, it was the next day after —it was the day that they said they bought that Metzel contract. I think it was the 24th. I heard them testify that they went over to the Bank of Duncan on or about the 25th of May, 1913. The way this happened they were asked about that contract; after they had bought Metzler out they wanted me to pay back the $20,000. The first time they asked me to pay back the $20,000 was back in the First National Bank of Lordsburg in the room. As well as I remember it was the 24th of May. They showed me this contract with Dodson, where it said 9,000 head of cattle more or less," and they showed me this receipt showing 9,000 head of cattle more or less, and I told Mr. and I told them we were not going to guarantee anything. They said they were not surprised at any contract Dodson would make because he had done them up on every contract he had ever made with them. They showed me the Metzler contract where they bought over the Metzler property, so they said. I had a conversation with them at Lordsburg after they bought the Metzler contract— I don't know what day it was—anyway they told me that they had just made the arrangement with Metzler to turn these cows loose and that they wouldn't

(Testimony of S. A. Foster.)

ship these cattle. It was the 24th or 25th. It was before we went to Duncan. They said Dodson made a contract they could not afford to fulfill; that the buyer's cut would mean all the younger cut, while the seller's cut would mean just the opposite. The rules of selling in that country are that if you sell the seller's cut you would sell out the stuff that you wanted to sell. With the buyer's cut he takes a per cent of the best stuff you have got. So my understanding was that they would give Metzel $2500—and give back that contract where it says "Buyer's cut." We then went to Duncan and called Mr. Lanneau and went to the bank to look at the original contract. We went in there and I think Mr. Dangberg or Mr. Sims had a contract with them—supposed to be a copy of the one in the bank, and said: "We want to see if this is like the one you have in escrow." Mr. Lanneau looked at it and said that it was not. Mr. Dangberg asked why he thought so and Mr. Lanneau said it was a different type altogether from what his typewriter was. They talked about Dodson mostly and about the contract he made with Metzel and Wilson and Roberds and Robinson, on behalf of the Cattle Company.

It was just before we started for Lordsburg that Dangberg said, "Foster ought to give us back the $20,000." He stated that Dodson had never made a contract that was what he represented it to be. He just said they had to buy the Metzel contract which was not what was represented, but they never said anything about his not having authority to make this

(Testimony of S. A. Foster.)

trade. They said he misrepresented this contract and showed us the one he sent them. They did not say anything about Dodson not having authority to make the Lazy B deal. (Defendants' Exhibit "T.")

I think that was about all that was said, and we went back to Lordsburg that night, and the question came up over our steers the next day or the next day. I have forgotten just what it was, about shipping the steers they had gathered. I told them that they could ship them by putting the money in the bank at Duncan, and they went out and turned our steers loose and would not ship them, that was Mr. Danberg. They did ship their steers either the next day or the day or so after that. The question came up as to what to do with this money that these steers brought and Mr. Dangberg seemed to want to hold it in the Lordsburg Bank, where this stuff was being shipped till the $20,000 deal was settled, and I told him not to ship until he put the money in the Duncan Bank where the papers were, and they went out in the automobile and turned them loose on the ranch. They had some of our Lazy B cattle gathered with these cows. These steers that were to be shipped we were to get credit for them, but they wanted to hold the money till this $20,000 was settled, and I told him provided they put it in the Duncan Bank they could ship the steers, and they decided to turn the steers loose. The next time I saw Mr. Dangberg or Mr. Humphreys and had a conversation with them was sometime after the first of June when Mr. Day was there at Lordsburg. I also had a talk in the Duncan

(Testimony of S. A. Foster.)

Bank. The first conversation was in the bank in Duncan, Mr. Dangberg, Mr. Day and myself being there, and Mr. Lanneau was in and out; he was cashier there and we were talking over the proposition of trying to get together on this $20,000. Mr. Day asked Mr. Dangbreg if he didn't think that the fact that 9,000 head of cattle was on this contract, that that was misrepresented in the first place. He said: "Well, we did think we had a good deal." That was about all I heard him say. I heard Mr. Day say that to Mr. Dangberg and Mr. Dangberg made that reply. Mr. Day said to Mr. Dangberg, "The fact that you were getting 9,000 head of cattle for $200,000, that you made an awful good deal." Mr. Dangberg kind of laughed and said, "We did think we had a good deal." And Mr. Day said "It was a misrepresentation on the face of the contract." When we were ready to go Mr. Dangberg said, "We will let the lawyers settle it." That is about all I remember. Mr. Dangberg never did object to Mr. Dodson's authority.

He stated the reason he did not see me was because Dodson told him I was an old man and he told Dodson to go ahead and finish the deal with me after he had started it. This conversation took place at the Bank of Duncan between Mr. Dangberg, Mr. Day, Mr. Lanneau and myself. I signed the receipt produced by Mr. Dodson for $20,000 paid me by the Highland Cattle Company, as I remember he tore the receipt out of a book he had there—a book he had folded up in his pocket; this was at the time

(Testimony of S. A. Foster.)

the contract was signed in March. The blank was filled in by Mr. Dodson. The middle lines of the receipt speaking about the number of cattle, appeared in different colored ink, light or blue ink, it was not in the receipt at the time I signed it. The words I refer to are as follows: "there are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land all leased, etc." That part was not in the receipt when I signed it. I do not know of Mr. Dodson's writing that in there later; the next time I saw it was in Lordsburg, or the day before we went to Duncan; I believe it was when we went to Duncan, or the day before, I don't remember which. I never saw the receipt with those words added in there until it was shown to me in the latter part of May, 1913; they were not in there. I never told Mr. Dodson to insert that portion in the receipt. I did not have the least idea it was in there; I didn't tell anybody to put it in over my signature. Mr. Day was not even in Nevada or Arizona at that time.

This receipt was first shown to me after it was signed at the First National Bank in Lordsburg about the 24th or 25th of May, at the time that contract was—to turn those cattle loose; I think it was the day we went to Duncan, or the day before; I don't remember just exactly. It was before we went to Duncan. I think Mr. Sims had it, either him or Mr. Dangberg, they had it in the house. They asked me if the receipt was like it was when I signed it. I told them no and said this 9000 head was written in there, because we didn't guarantee any number, and I says,

(Testimony of S. A. Foster.)

"You can see this is a different ink," and Mr. Dangberg said, "It is fading."

Q. Now, prior to your entering into the contract with—Mr.—the contract of March 23, 1913, with Mr. Dodson, which is in evidence here, as manager of the Highland Cattle Company, had you been informed by any person of the Highland Cattle Company, had you been informed by any person there in that territory, concerning Mr. Dodson, as representing the Highland Cattle Company?

A. Mr. Dodson told me when he came down to look over the ranch, that he was the general manager, buying up these ranches, and asked me about Henry Martin's outfit, and asked me all about the different ranches around there in the country, and I told him the best I could. Mr. Wilson also informed me of Dodson's representing the Highland Cattle Company. This was along in January or February, the last of January or the first of February, before this contract was signed, at the Wilson ranch.

Q. Did you have any talk with Mr. Wilson of the Wilson ranch prior to March 25th, 1913?

A. Yes, sir.

Q. Did you have any conversation with him concerning any sale by them of cattle to the Highland Cattle Company?

A. Yes, sir.

Q. When did that conversation occur?

A. Well, it was along the latter part of January, or the first of March, when I was talking to Wilson.

Q. And whereabouts?

(Testimony of S. A. Foster.)

A. At Lordsburg, and then at the Wilson ranch.

Q. Now, referring to the one at Lordsburg, who was present at that time?

A. Well, I don't know of anyone that heard the conversation except Wilson and myself.

Q. State what was said *that* that time by Mr. Wilson to you concerning any sale of cattle by them to the Highland Cattle Company?

Mr. Wellborn: That is objected to as incompetent and hearsay.

The Court: Objection sustained.

Q. By Mr. Edwards: At the time you entered into this contract with Mr. Dodson as manager of the Highland Cattle Company on or about the 25th of March, 1913, did you enter into it with the belief that Mr. Dodson was entering into the contract as manager and agent of the Highland Cattle Company?

Mr. Wellborn: If the Court please, just for the sale of the record, that is the third or fourth time that he has described that contract as a contract made as general manager of the Highland Cattle Company.

Mr. Edwards: It so states on its face.

Mr. Wellborn: On the contrary, it does not; that is the very issue of the case; it is easy enough to refer to the contract as an exhibit.

The Court: I think you had better conform to Mr. Wellborn's suggestion in that regard, and refer to it as an exhibit.

Mr. Edwards: Let us see, what is the exhibit number?

The Clerk: Exhibit R.

(Testimony of S. A. Foster.)

Q. By Mr. Edwards: At the time you entered into this contract—signed this contract marked Defendants' Exhibit "R" did you believe that Mr. Dodson had authority to sign on behalf of the Highland Cattle Company?

A. Yes, sir.

Q. Did you believe at the time you entered into that contract with him that he was, in fact, the manager of the Highland Cattle Company?

A. Yes, sir.

Mr. Edwards: Do you people deny the tender on the part of Day and Foster, and readiness to perform this contract, Exhibit R?

Mr. Sims: With reference to performing it?

Mr. Edwards: Yes, our tender to you.

Mr. Sims: On the 20th of June of the notice—we will admit receiving the notice on or about the 20th of June drafted by Day and Foster's attorneys. I believe I have copies here.

Mr. Edwards: Have you a copy of the notice served on you there?

Mr. Sims: There is one dated the 12th of August, 1913. Is that the one you want? We have one dated in August, 1913.

Q. By Mr. Edwards: Did you meet Mr. Dangberg at the bank of Duncan on or about the 20th of June, 1913?

A. I think it was about the 20th.

Q. Did you make any tender to him at that time of any deeds or bill of sale to the cattle and ranches

(Testimony of S. A. Foster.)

of the Lazy B of Day and Foster in accordance with the terms of the contract?

A. The bill of sale and the deed that was in there?

Q. Well, did you make any tender to him of the bill of sale and deeds at that time?

A. The 20th of June?

Q. Well, on or about that time?

Mr. Edwards: Unless counsel will admit that, we will take steps to prove that we had in the bank at that time, and tendered abstracts and deeds and bill of sale. Do you make any point of that?

Mr. Sims: I forget the date that you made that tender. If you made any—I have August 12th.

Mr. Merriam: The deed called for in the contract —the contract calls for this to be consummated on the 20th of June, and we had the deeds already there, including abstracts and everything else.

The Court: How is that? Bill of sale and deeds that were in the bank?

Mr. Sims: Yes.

Q. By the Court: You had an abstract of title. Did they call for an abstract?

A. Yes, that is, a clear title, and we made an abstract.

Q. And you had it ready to sign?

A. Yes, sir—yes, sir.

The Court: Now, there ought not to be much time taken up about this.

Mr. Edwards: Well, I think we have to prove that we were willing and ready to perform under our terms of the contract.

(Testimony of S. A. Foster.)

Q. By the Court: Were you ready and willing to perform the contract?

A. Yes, sir.

Q. And you had the abstracts made out in accordance with the contract?

A. Yes, sir.

Q. Did you tell them you had it?

A. Yes, sir.

Q. By Mr. Edwards: And the deeds to the property?

A. Yes, sir.

Q. You had them ready at the bank?

A. Yes, sir.

Q. And the bill of sale to all the cattle?

A. Yes, sir, it was all executed and put in the bank there.

Q. Did you tell Mr. Dangberg you had them there?

A. Yes, sir.

Q. What did he say, do you remember?

A. Well, he made the remark that Dodson had done them up in a way that they did not—couldn't raise this other 230,000, but wanted to borrow $100,000 from Mr. Day in Lordsburg there, provided they went ahead with the deal, at 6% interest, and Mr. Day said if the security was gilt-edged it would be all right, but he didn't go ahead with the deal.

Q. Did he tell you at any time—

Mr. Sims: I object to leading the witness, Mr. Edwards.

Q. By Mr. Edwards: Did he tell you at any time

(Testimony of S. A. Foster.)

about whether he was willing to go on with the deal, or desired to go on with it or not?

A. He just said that Dodson had done him up on those other contracts.

Q. By the Court: That is all he said on the subject?

A. Yes, sir.

Q. By Mr. Edwards: These abstracts of title and deeds that you referred to covered all of your property, did they?

A. Yes, sir.

Q. And they were all on deposit there in the bank at Duncan at that time?

A. On the 20th of June.

Q. On the 20th of June, 1913?

A. Yes, sir.

Q. And would you at that time have delivered the same to the Highland Cattle Company if they had paid the $230,000 as specified?

A. Yes, sir.

The said bill of sale is as follows: (Plaintiff's Exhibit "S.")

PLAINTIFF'S EXHIBIT "S."

Cross-Examination.

I met Mr. Dodson in February, 1913, at Duncan and he spoke about buying our folks out. Prior to that time he had not directly spoken to me but through Kuhn and a bunch of them at Lordsburg. It was not but a short while prior to that February conversation I

(Testimony of S. A. Foster.)

had with him, something like a month. The first time that Dodson came out and went over the range with me was about the middle of February. I couldn't tell you what day I first became acquainted with Dodson. I had heard of him before I met him. To the best of my recollection I met him along in December or January somewhere.

Q. Along in December or January when you first met him, did you have any talk about looking over the Lazy B?

A. Just a little about joining the two outfits you know.

Q. Did he say something about joining the two outfits?

Q. He referred to the cattle he had bought from Robinson and Wilson, did he not, joining them with yours?

A. That was in February that we talked that over.

Q. You don't remember anything that was said in December when you first met him?

A. No.

Q. Do you remember a conversation that you had with Mr. Humphrey near Lordsburg, or at Lordsburg sometime in the early part of May when Mr. Humphrey was down there by himself, about wanting to know when the chutes were to be sent out to your place so that your cattle could be counted out?

A. No; no, I don't remember that.

Redirect Examination.

Q. Mr. Sims called your attention to the fact that at that time Mr. Dangberg said that he told Dodson

(Testimony of S. A. Foster.)

as long as Dodson had started in on the deal that he would let him finish it?

A. Go ahead; yes. That was what was said at that time by Mr. Dangberg.

Q. Mr. Sims asked you if the land that you had and your ranches which were under water, under cultivation, formed part of your cattle ranch, and I understood you to say it did not?

A. It forms part of the $50,000. You see, on real estate outside of horse feed and stuff that is raised on the farm, is what we use on the cattle ranches. The other is sold separate from the cattle ranch. This irrigated land all went in on the $50,000 deed. That was in answer to the question whether it went in or not. I offered to sell the range and have the cattle and the cattle ranches go in, for this $50,000 real estate constituting this $50,000, all went in in Mr. Dodson's trade. I showed Mr. Dodson this cultivated land, I showed him all of the real estate.

CHARLES A. MARTIN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

I reside at Silver City, New Mexico. I am engaged in the cattle business principally, and have been so engaged for twenty-eight years. I am engaged in buying and selling cattle and cattle ranches and lands. I am familiar with the market condition of cattle, range cattle in the territory around Duncan, New Mexico, in March, 1913, I should say, owing to the grade of

(Testimony of Charles A. Martin.)

cattle, anywhere from $27 or $28 to $35. There is a big difference in cattle in that country; some are better bred than others. I know of the cattle in this deal that was on this range in controversy. I was offered $32 a head for my cattle. That means with that year's calves thrown in, not the cows; I was offered $32 for my cattle that year and I think these cattle were worth $32. Mine are north of the river, fifty miles away. Ninety head of horses are worth, I should say $50 around. I know this range in controversy very well, I should say it is worth $50,000; I don't think it could be bought for double that now, it was worth that at that time; of course that is only approximate. It is hard to tell what a range is worth. I think that is a very reasonable value of it. I am familiar with the custom of selling cattle in that country around Duncan in all the years.

B. R. LANNEAU, called as a witness on behalf of defendants, being first duly sworn, testified on direct examination as follows:

I reside at Duncan, Arizona, and am the cashier of the Bank of Duncan, Duncan. I have been engaged in the banking business about five and one-half years. In that capacity I have become acquainted with the market price of cattle bought and sold in that vicinity —deals of cattle that would pass through our bank. I am familiar with the reasonable market value of range cattle in March, 1913. It was anywhere from $27 to $31 for yearlings. I am acquainted with Mr. Foster and Mr. Dodson. I first met Mr. Dodson several

(Testimony of B. R. Lanneau.)

weeks before the contract was entered into between him and Foster. I had a conversation with Dodson in relation to whom he represented, when he and Mr. Foster came into the bank and requested me to draw the contract for them. There was quite a little discussion before the contract was drawn as to what sort of contract they wanted to make. Mr. Foster made the proposition that they would sell their outfit for $250,000 just as it stood without any tally or anything, or they would sell their land for $50,000 and tally the cattle off. That is, count them off at $30 a head for everything except calves, which would come in at $15 a head. Mr. Dodson said that he didn't care to tally them off; that he had been over the range several times and was satisfied with the value of the land and also with the value of the cattle on the ranch; that it would be a great deal of work and trouble to tally them out, and asked me to make the contract for $250,000 for everything owned by Day and Foster. He asked Mr. Foster how many cattle he had on the ranch and Mr. Foster said he thought he had about 7,000 head of cattle and about 90 head of horses and about one thousand acres of land. I asked Mr. Dodson in making this contract out whether to make it the Highland Cattle Company or how; he said to have it signed and he told me to make it to J. C. Dodson, manager of the Highland Cattle Company. I asked Mr. Dodson about his authority and he said he had authority to sign and tie the company up on these contracts, and that he would give us a draft on the Highland Cattle Company for $20,000 and as the papers were all to be left

(Testimony of B. R. Lanneau.)

in the bank in escrow, we were taking no chance, and if the $20,000 was paid it would prove his authority for making these contracts for the Highland Cattle Company, and from that represented we proceeded to execute and draw up the contract. I drew up the contract for them at that time.

Mr. Edwards: I guess there is no dispute but what the documents you claim are spurious contracts were not written by Mr. Lanneau?

Mr. Sims: No; we don't claim that they were.

Mr. Lanneau: The first time that I saw plaintiff's exhibit 3 was when Mr. Sims and Mr. Nichols and Mr. Dangberg and Mr. Foster came to Duncan and asked me to let them see the contract that I had in escrow, and Mr. Dangberg presented me with this so we got the original out and asked me if it was a duplicate of the contract that I had made. I told Mr. Dangberg that it was not. And he remarked that I had better read this over first before I was so sure about it, and I told him that it was different from the type on the machine I used, and on the machine on which this contract was written was so different there was no question about it. I saw the document marked defendant's Exhibit "U." In making that contract out Mr. Dodson asked to have a duplicate of it made and he also had these blank receipts. These blank receipts were like Exhibit "U." He said his reason for wanting a receipt and also copy of the contract was that he could send it in to Nevada and show them the sort of contract he had made, and that receipt was to verify the draft for $20,000. Parts of

(Testimony of B. R. Lanneau.)

that receipt were filled in, in my presence at that time. The portion of the receipt in light blue ink "there are about 9000 cattle above October calves and about 90 horses and 1000 acres or more deed land all leases, etc.," was not written in my blank at that time. I saw Mr. Foster sign the receipt. We did not have any ink in our bank of the character that would write as those words were written. We only use one kind of ink and that is what the rest of it was written in. I don't recall any further conversation as to Dodson's authority or anything of that sort at that time. I don't think I saw Mr. Humphrey at any time, but I saw Mr. Dangberg when he came up to Duncan to examine the contract that was in escrow in the bank. Don't remember what date that was, it was sometime after the contract was executed in the bank. At that time Mr. Dangberg said he would like to look over the contract that was in escrow in the bank and we went into the bank just after dark in the evening and I gave the original to Mr. Dangberg and he and Mr. Sims and Mr. Nichols compared it with the supposed copy that they had in their possession. After going over the contract and during the time that these gentlemen were examining the contract, they said Mr. Dodson had sent not the copy of the real contract but another copy, and I don't remember the words now but they were talking about Mr. Dodson's being crooked and having gotten into trouble over some of these things. I don't remember anything being said or any conversation as to his authority one way or the other, only they said he had been crooked with

(Testimony of B. R. Lanneau.)

them and gotten into trouble over these contracts. Day and Foster subsequently, prior to the 20th of June, deposited in our bank, bills of sale and deeds and abstracts of all their property and they were there on the 20th of June, they were there probably within a few days after the contract was left in escrow. Foster had the abstracts made as soon as it was possible to get them, and then the deeds and bill of sale were made out and put with the contract. Nobody representing the Highland Cattle Company did, either on or about the 20th day of June, or at any time, tender any money for these deeds or ask for them. These documents have remained in my possession up to the present time. The only other conversation that I recall of having with Mr. Dangberg about this business was immediately after these gentlemen in the bank completed their examination of this original. We were all outside on the street and discussing the matter and talking about the way Mr. Dodson had done in these matters and Mr. Dangberg at that time, all *all* were more or less joking and talking about it, and he told Mr. Foster he thought they ought to have their $20,000.00 back, and Mr. Foster laughed and told him the $20,000 had all been loaned out and he said "Oh, if you assign the note we will accept that." Foster said "I can't do that at all. We will have to look into these. Anyway, I would not make any statement or do any business at all without talking to Mr. Day." That is about the only other conversation that Mr. Dangberg and I ever had in connection with this contract, or with Mr. Dodson. I did not, at that time

(Testimony of B. R. Lanneau.)

when they were in the bank together, hear Mr. Sims or Mr. Dangberg say that they repudiated the contract and demanded the money back. The only demand or talk of the money being paid back that I recall was just the conversation which I stated took place outside of the bank after we got through in there. I did not hear any statement at that time that they repudiated the contract, only that Dodson had been crooked with them, and the conversation I have repeated with Mr. Foster as to returning the $20,000. That is all the conversation I now recall in connection with that.

Cross-Examination.

I don't remember that Mr. Dangberg or Mr. Sims or both of them informed Mr. Foster that the Highland Cattle Company repudiated the contract that was in my hands in escrow, and demanded the money back —I won't say that they did not say that. I think I probably would have remembered it if they had made any demand and repudiated the contract in my presence. There was a great deal of discussion among the four of them. I had no interest in it except as cashier of the bank with these papers in my charge. Being situated as I was and it being a novel situation, I was interested in what was going on and if they had used language of that kind and I had hear it I think I would remember it.

Redirect Examination.

Q. Did you at any time during this conversation at which Mr. Dangberg was present hear any statement made by Mr. Dangberg, Mr. Humphrey or anyone, representing the Highland Cattle Company, to the ef-

(Testimony of B. R. Lanneau.)

fect that Mr. Dodson had no authority to enter into this contract?

Mr. Sims: The witness has already answered that. He stated the conversation, and the same question was asked and he said no.

The Court: I think he has gone over that.

Mr. Edwards: I wanted to be sure that I had covered it. I apologize for asking it again.

The Court: He detailed the conversation.

Mr. Edwards: He detailed the conversation, but I wanted to bring out the fact that such a statement—

The Court: You have a right to negative what they testified to, by this witness—that it did not occur. Now, I have understood his testimony that he has already stated that there was no such language used, to his memory, that they repudiated the contract.

Mr. Edwards: That is clear. Now I want to get out if there was any statement at that time that Dodson had no authority.

The Court: I will let him testify to it again.

A. No, sir.

B. B. OWNBY, a witness called on behalf of the defendants, being duly sworn, testified on

Direct Examination

as follows:

I reside at Lordsburg, New Mexico, and am engaged in the garage business—automobile business. I know J. C. Dodson and know Mr. Dangberg and Mr. Humphrey. I know where the Day and Foster ranches are around Duncan. I drove Mr. Dodson and Mr. Dang-

(Testimony of B. B. Ownby.)

berg over the Day and Foster ranges at different times in the spring of 1913. I took them over about all of the ranges but not the ranches. I don't know as it was particularly the Day and Foster cattle that they looked at on that trip. When we would drive out and look at a bunch of cattle Mr. Dodson would tell these gentlemen there was so many Box M's and so many Lazy B's in a bunch of cattle when we would drive up close to them. I don't recall how many times I took them over this range. I couldn't say as to whether some of the times were prior to March 25, 1913, I hauled them around there a good deal along through the year of 1913, but I couldn't tell you the date; it was in the spring of 1913, before the rainy season.

Dodson had an automobile shipped in from some place, I think that was prior to the date he brought the automobile.

Q. You didn't take them after Mr. Dodson was arrested?

A. Not after that by the machine. His machine was left with me and I shipped it to Sacramento, I think. That is where it was shipped to by the orders of Mr. Dangberg. That is the machine Mr. Dodson had shipped in there. I fix it as being prior to the time Dodson shipped in the machine as his own, that I hauled them around there. The conversation that I recall between Mr. Dangberg and Dodson at any time on these trips, was that they were talking about these cattle that we would see on the range. I think the first ranches that the Highland Cattle Company were operating around Duncan or Lordsburg as their own,

(Testimony of B. B. Ownby.)

was the one they bought from Roberds on the Box M ranch. I think it was in the spring of 1913, they were operating it; it was about that time they bought it.

H. C. DAY, called as a witness on behalf of the defendants, being first duly sworn, testified on

Direct Examination

as follows:

I reside at Pasadena and have been engaged for thirty-one years in raising cattle on the range. I am familiar with the market value of cattle. I think the reasonable market value of range cattle in Duncan, Arizona, on the 25th of March, 1913, are about $30.00. I am familiar with the market value of such lands as were possessed by Day and Foster around Lordsburg, and Duncan, in March, 1913. The land which we agreed to convey under the agreement which is marked "Defendant's Exhibit "R" was of the reasonable market value of about $50,000. I met Mr. Lanneau and Mr. Dangberg and Mr. Foster the early part of June, 1913, in the back room of the Bank of Duncan. Mr. Dangberg asked me to release him from his contract to purchase the ranges and cattle. I told him we had entered into the contract in good faith and that we intended to carry out our part of it according to stipulation. I think I asked Mr. Dangberg if he had looked the ranges and cattle over and he said he had to some extent and had taken pains to post himself somewhat. I asked him why he had not talked to Foster about it and he said that Dodson had commenced the trade and he thought he had better let him finish it. I met Mr.

(Testimony of H. C. Day.)

Dangberg in Lordsburg, New Mexico, once after the time in June. That was sometime shortly before the 20th of June, 1913. Mr. Foster, Mr. Dangberg and myself were present. There was some talk about Dangberg, about his (Dangberg's) going on with the contract, provided he could borrow $100,000 from me at six per cent. He did not say he would go on with the contract, but he asked if he could borrow that if he concluded to go on with the contract. I said I would let him have it if he had gilt edge security. He came down to the train when we took the train for Duncan. I don't recall any more of the conversation. I was willing and ready on the 20th day of June, 1913, to comply with the conditions on my part to be performed under the contract, defendant's exhibit "R." I took a great deal of pains to get the abstracts there in time. I went to the county seat myself to get them and everything was according to the contract on the 20th of June, 1913. None of the remaining $230,000 has ever been tendered to me.

H. F. DANGBERG, recalled for further Cross-Examination,

testified as follows:

By Mr. Edwards:

Q. I show you, Mr. Dangberg, Plaintiff's Exhibit 4, and I will ask you if you supplied Mr. Dodson with that form of draft for his use prior to the first of March, 1913?

A. I don't know exactly the date.

Q. Well, prior to March 23, 1913?

(Testimony of H. F. Dangberg.)

A. I believe I did.

Q. I will ask if prior to March 23, 1913, you had forms of advice printed and supplied Mr. Dodson with these?

A. I did.

Q. What was the purpose of the advices?

A. To protect us in any draft drawn on the company, to have the advice come ahead of the draft.

Q. These were forms of receipts for him to obtain from the persons from whom he bought cattle or to whom he sold cattle, showing the amount?

A. It was for the purpose of protecting us in the matter of obtaining the money.

Q. So that you would know the correct amount that he had paid out?

A. Yes, sir.

Q. I will ask you at the time you testified before the *habeas corpus* proceedings of James Dodson, held June 13, 1913, in New Mexico—

The Court: He has testified that he remembers that occasion.

Q. By Mr. Edwards: I will ask you if you testified at that time as follows: I will bring this reporter's transcript by you so that you can see it: "Q. You have stated that Mr. Dodson at the time of this transaction to which you have testified and theretofore was acting as manager of the Highland Cattle Company. Is that correct? A. At what time? Q. At the time of the transaction you have testified to and theretofore. A. The transaction which we are speaking of noe, he was manager of the company. Q. He had

(Testimony of H. F. Dangberg.)

authority to receive money? A. Yes, sir, in the name of the company, and transmit it to me. Q. He had no authority to pay out money? A. Upon drafts; upon advices sent to me, and secured by draft. "Q. How was that authority evidenced? A. It was delegated by the board of directors. Q. Is it entered upon the minutes of the corporation? A. It is—" Have you those minutes with you? A. I have not. "Q. Where are they? A. I think they are in San Francisco. Q. Have you a copy of them? A. I have not. Q. Are you able to produce them? A. I can. Q. Will you do so? A. I will as soon as I can. Q. I understand you to testify that according to these minutes his authority as manager in paying out money was strictly defined, as you have just stated to the best of my recollection. He was sent down there to conduct the business of this corporation in this region? A. He was. Q. And that business was to be the business of buying and selling cattle? A. Yes. Q. And his authority nevertheless was to receive money and not pay it out except upon a letter of advice and draft? A. A letter of advice,—he had a draft book,—and advice attached. Q. Then the draft and advice would go in the same letter? A. No, don't misunderstand me. The advice and the draft are attached in the same book. Whenever he drew a draft the advice was to be forwarded to me as secretary, the draft came through the bank at Midon, and upon the invoice corresponding with the draft, the money was drawn. Q. That is, he would fill out a draft as required and send you an invoice, and hand the man he was paying the draft; that

(Testimony of H. F. Dangberg.)

is it, is it? A. Yes. Q. And the minutes specify, do they, that if the draft which came to you did not correspond with the invoice you received, you wouldn't pay it? A. It specified the means of doing business. Q. He had authority to pay out corporation money in drafts? A. Yes. Q. And he was not limited as to the things for which he was to pay, or was he? Did you specify what he was to pay for? A. That was to be an amount for his immediate personal expenses. For any deals. We are supposed to be thoroughly advised of these deals before paying out the draft. Q. Did the minutes recite that? A. I don't know as the minutes recited that. Q. What is the distinction you make for expenses and for deals he must draw on you? A. It was understood that he drew drafts and put the money there for the manager of the ranch. Mr. Roberts: Q. Who placed this money there for Mr. Roberts? A. I believe that Mr. Dodson did at times for expense account. Q. And he had authority as a matter of fact to pay ranch expenses? A. Sure. Q. Now, you stated it was understood that so and so and so and so was the case. What do you mean by that? It was understood in deals that he was to advise before he paid and in ordinary expenses he did not need to. How as that understood? A. He had previous authorization to pay off his ranch expenses. Q. How was that given? A. By the board of directors. *A.* Entered on their minutes? A. I believe so. Q. Have you read those minutes? A. I have. Q. You know whether that is there, don't you? A. I am the secretary of about 13

(Testimony of H. F. Dangberg.)

corporations and I don't know the exact wording and language of all the minutes. Q. What you are testifying to is merely from your recollection? A. To the best of my recollection. Q. When you say understand you mean Mr. Dodson understand so? A. I mean everybody understood so. I recollect these statements being set out, but the exact wording of them I can't express at this time. Q. Then at the meeting of the board of directors, it was discussed and settled that for deals he must get authority to pay out the money, but for the expenses he could pay the money. A. He had previous authority for going ahead for the expenses of running the ranch. For deals he had to be authorized. Q. He had authority to pay out ranch expense? A. Yes, indeed. Q. What was this supposed to be? A. For the running of various ranches bought out here about Lordsburg. Q. Salaries? A. Salaries. Q. Feed? A. Feed. Q. Anything else? A. Yes, their other ranch expenses besides that. Q. Now, what was this proposition of deals that you speak of? You say that in deals he was not authorized to pay out money without specific authority for each deal. What do you mean by deals? A. Purchase of cattle and ranches. Q. He was authorized to negotiate for and contract for the purchase of cattle and ranches, but he couldn't pay for them until he had been specifically authorized. A. That was, he presented the deal to the board of directors before the sale was consummated. It was that no one of the directors could do business without the knowledge of the rest of the directors. Mr. Dodson was one of the directors. Q.

(Testimony of H. F. Dangberg.)

And that the manager couldn't do business in buying and selling ranches and cattle without the authority of the board of directors? A. Without a subsequent authorization or knowledge of the board of directors. Q. Do you mean by that he couldn't do it without a subsequent ratification, that you told him to go ahead and deal, and that if it suited you, you would ratify, and if not, it was up to him? A. No, sir. Q. What do you mean by saying that he couldn't do business without subsequent ratification? A. He could look up deals and seek such deals, but no deals to be consummated without the full knowledge of the board of directors. Q. He couldn't enter into deals at all? A. He could look them up. Q. But he couldn't contract in the name of the corporation? A. Couldn't close a deal without knowledge of the board of directors. Q. Couldn't contract without the authority of the board? A. He couldn't go ahead and complete a deal without the authority coming from a board of directors. He could look up his deals but he couldn't complete his deals without the knowledge of his board of directors. Q. What is complete it? A. Paying for it. Q. Then he could— He had a right to take money in the name of the corporation? A. Not himself, but in the name of the corporation."

Did you so testify at that time?

A. I believe I did.

Q. And that was true?

A. Yes.

Q. Mr. Dangberg, we have one of the originals of

(Testimony of H. F. Dangberg.)

the Metzel contract, and here is the other one that you did not introduce. That is the original.

A. Yes, sir; with the notations on there.

Mr. Edwards: We offer this in evidence.

The Clerk: Defendant's Exhibit V.

Q. By Mr. Edwards: In this Metzel contract there are four brand marks. Will you decipher those for our benefit?

A. Lazy B, Box M, Pat Wrench, and the Long S, or Lazy S.

Q. That is, reading them from left to right?

A. Yes.

Q. Which of those brands did you acquire from other than the Lazy B people?

A. The Box M and the Pat Wrench and Lazy S.

Q. From whom were they acquired?

A. From Robinson and Wilson deals.

Q. And you had no other cattle than what you acquired from Robinson and Wilson at this time?

A. None whatever.

Q. And the cattle which you contemplated delivering—

A. I think we had other brands than are enumerated on there.

Q. But no other cattle except what you got from them?

A. None other.

Q. The cattle that you contemplated selling under this Metzel contract were these cattle that you mentioned and the cattle that you were acquiring from the Lazy B people?

(Testimony of H. F. Dangberg.)

A. Yes.

Q. How many cattle did you have down there from the Wilson and Robinson outfit in 1913?

A. In the neighborhood of 3000, to the best of my recollection.

Q. And the Metzel contract called for how many cattle?

A. I forget now. Somewhere in the neighborhood of 4000, I think.

Mr. Edwards: That is all.

Redirect Examination

By Mr. Sims:

Q. This Metzel-Kidwell contract original here—you did not see these until you were down in May, 1913?

A. Not until the investigation down there. We saw a seller's contract.

Q. Do you remember about when was the first time you saw this original?

A. About the 26th of May. Between the 23rd and 26th of May.

Q. Mr. Edwards read you a long list of questions and answers that you made in a preliminary hearing in the criminal matter of Dodson, and in one of the questions you stated that the by-laws authorized Mr. Dodson to send money down there. Was that correct?

A. That was not correct.

Q. You did not have the by-law book?

A. No, I went back and read the by-law book afterwards and found that I was wrong in that statement.

(Testimony of H. F. Dangberg.)

Q. So you were wrong in that staetment down there?

A. I was wrong in that statement at the investigation or trial.

Mr. Sims: I think that is all.

Recross-Examination

By Mr. Edwards:

Q. Wherein did the contract that you speak of as the bogus Metzel contract differ from the genuine?

A. The bogus contract, that is, the one that we had the carbon copy of, was a seller's contract, and the contract that we found on investigation was a buyer's contract.

Q. You mean one was the seller's cut and the other the buyer's cut?

A. Yes.

Q. But the amounts of cattle and the brands of cattle and everything else was the same in the two?

A. As to the exact comparison, I am not prepared to say.

Q. Hace you those bogus copies with you?

A. I don't know, but I think they are here.

Q. The fact is that the bogus contract shows that there was a contract entered into by Dodson as manager of the Highland Cattle Company, isn't it, as this reads?

A. Yes.

Q. And the amount of cattle and the brands were the same?

A. Practically the same, excepting as to the cut.

(Testimony of H. F. Dangberg.)

Q. The Lazy B brand was specified in each of them?

A. To the best of my recollection; yes.

Q. And you understand that this writing shows that you paid the Metzel people some money to release you from this contract?

A. That is so.

Mr. Edwards: That is so.

H. C. DAY, recalled as a witness for defendants, on

Direct Examination

testified as follows:

I never counted the cattle on our range in thirty-one years; it would probably take three years to count them all, we would have to attend all the roundups for three years. The estimate is arrived at by the number of calves branded each year. Different parties have different estimates, from four to five times as many as the calves that you brand.

S. A. FOSTER, recalled as a witness on behalf of defendants, testified on

Direct Examination

as follows:

I know of the ranch that was reputed to be run by the Highland Cattle Company down near Lordsburg and Duncan in February and March, 1913. The foreman of that ranch, or manager of the ranch, was named Roberds. Dodson stayed in town and told Roberds what to do—he was at El Paso *to*.

I was not informed by any one that Humphreys and

(Testimony of S. A. Foster.)

Dangberg were down in Duncan sometime in February or March, 1913. I was not told that they wanted to see me—not that I remember of.

FRANK V. HUMPHREY, recalled as a witness for the plaintiff, testified in rebuttal on

Direct Examination

as follows:

I heard the testimony of Mr. Foster about the conversation that he had about not shipping any cattle and about the Kidwell contract. I met Mr. Foster on this ranch and went out in a machine and they had a herd of cattle rounded up. It may be one day prior to the 23rd day of May, when the Kidwell contract was cancelled, or it may be on the morning of that day. I met Mr. Foster near Adobe. They had some cattle rounded up near Adobe. I told Mr. Foster that I thought as we had found out that the contract was buyer's cut, after we straightened up with the purchasers of the cattle and let them loose, as if we let them cut the cows, they would cut our best breeding cows and we would have nothing left on the ranch. In the conversation I had at that time I did not ask him to pay back $20,000; it was never mentioned.

Cross-Examination.

I was suspicious about the Lazy B contract at that time, but of course I did not know anything about it as yet. I did not know anything that was wrong at that time. I did not know that the contract was not for nine thousand and I did not know that they did not have 9,000 head of cattle, it was only hearsay.

(Testimony of Frank V. Humphrey.)

People said they did not think they had that many cattle, *in* heard people talking in that respect. I did think there was something wrong with the Lazy B trade. I thought there was something wrong with the trade on account of the others that we found. I think it was perhaps a week previous to that that I thought there was something wrong with all of the trades. I wired Mr. Dangberg to come there. I wired him that I thought there was something wrong with the Lazy B trade. I don't remember mentioning the number of cattle; possibly I did. I said there was something wrong with the trade. I remember that I thought the Lazy B trade was wrong also.

Wherefore, the plaintiff herein, hereby presents to the court the foregoing amended bill of exceptions and prays that the same be settled, allowed and filed as plaintiff's bill of exceptions.

OLIN WELLBORN, JR.,
WM. M. SIMS,
MADISON MARINE,
Attys. for Plaintiff.

Pursuant to the stipulation of the parties hereto, signed by their counsel of record and heretofore filed herein, the foregoing is hereby certified by me as being correct and is allowed as the engrossed bill of exceptions in said case, to be used upon writ of error or proceedings to be taken herein.

Dated this 6th day of March, 1917.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: Civil No. 299. In the District Court of the United States, in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, copartners doing business under the firm name and style of Day and Foster, defendants. Amended Bill of Exceptions. Receipt of a copy of the within is hereby admitted this 28th day of December, 1916. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt & LeRoy M. Edwards. Filed Feb. 5, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Wm. M. Sims, Madison Marine and Olin Wellborn, Jr., attorneys for plaintiff.

In the District Court of the United States in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants.

Stipulation.

It is hereby stipulated and agreed, that the bill of exceptions on file in said action, may be presented to the court for allowance and settlement on the 13th day of February, 1917, at the hour of ten o'clock

a. m., thereof, or as soon thereafter as said matter may be presented to the court; and

It is further stipulated and agreed that the bill of exceptions on file herein may be approved and allowed by the court without objection.

Dated this 12th day of February, 1917.

OLIN WELLBORN, JR.,
WM. M. SIMS,
MADISON MARINE,
Attorneys for Plaintiff.
J. H. MERRIAM,
JOSEPH L. LEWINSOHN,
HUNSAKER & BRITT and
LEROY M. EDWARDS,
Attorneys for Defendant H. C. Day.

So ordered.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: Civil No. 299. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, copartners, doing business under the firm name and style of Day and Foster, defendants. Stipulation that bill of exceptions may be presented to court for allowance and settlement. Filed Feb. 17, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806-8 Security Bldg., Los Angeles, Cal.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants.

Petition for Appeal.

To the Honorable Oscar A. Trippet, Judge:

The above named plaintiff, H. F. Dangberg Land and Livestock Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 19th day of September, 1916. does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record of the proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided.

And your petitioner further prays that the proper

order relating to the required security to be required of it be made.

WM. M. SIMS,
MADISON MARINE,
OLIN WELLBORN, JR.,
Attorneys for Petitioner.

[Endorsed]: Civil No. 299. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants. Petition for Appeal. O. K. Mar. 5, 1917. Hunsaker & Britt and LeRoy M. Edwards, by Smith. Filed Mar. 5, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Cal.

Civil No. 299.

In the District Court of the United States in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Assignment of Errors.

Now comes the plaintiff in the above entitled cause, and files the following assignment of errors, upon which it will rely upon its prosecution of the writ of error in the above entitled cause, from the decree made by this honorable court on the 19th day of September, 1916.

I.

That the United States District Court for the Southern District of California erred in sustaining the defendant's motion to strike out the testimony of H. F. Dangberg, witness for plaintiff, relating to Dodson's conversation with him concerning the agreement to purchase the "Lazy B. outfit."

II.

That the United States District Court for the Southern District of California erred in sustaining the defendants' motion to strike out *out* the testimony of H. F. Dangberg, witness for plaintiff, relating to Dodson's conversation with him concerning the agreement to purchase the "Lazy B. outfit," in which he stated that Mr. Dodson said that "this" (referring to receipt of date March 25, 1913, signed Day and Foster, Seller, J. C. Dodson, Buyer,) was a carbon copy of an original that was in the Bank of Duncan, purporting to be a trade or option that he had taken with the Day and Foster people on the "Lazy B. outfit," and that said court further erred in ruling out the offer of the plaintiff to establish by witness Dangberg the fact that Dodson in the presence of Mr. Humphrey and Mr. Dangberg handed to them this receipt and stated at that

time that that was a carbon copy of an original which was on file in escrow with the Bank of Duncan.

III.

That the United States District Court for the Southern District of California erred in sustaining objection to the question asked F. E. Humphrey, a witness for plaintiff, as to what, if anything, Dodson had said to him concerning the contract to purchase the "Lazy B outfit" from the defendants; and that the court further erred in sustaining the objection of defendants to the following questions asked the witness F. E. Humphrey on direct examination, to-wit: "Prior to seeing that document (referring to receipt above referred to) on that date did you have any conversation with Dodson relative to the "Lazy B." deal? A. Yes, we did. Q. What was the conversation, what did he say and what did you say at that time before you saw this document?" That the court further erred in sustaining defendants' objection to the following question asked of the said witness, to-wit: "What, if anything, did Dodson say relative to the document (referring to the above receipt)? That the court further erred in sustaining the objection of defendants to plaintiff's offer in evidence, of said receipt marked defendants' Exhibit "Q."

IV.

That the evidence was and is insufficient to justify finding No. 2, which finds that "During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the state of New Mexico and in Arizona. That for several months prior

to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona and during all of the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona."

V.

That the evidence was and is insufficient to justify finding No. 3, which finds that "On or about the 25th day of March, 1913, the Highland Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day and Foster, which said contract was and is in the words and figures as follows:

'This agreement made this twenty-first day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part.

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 ($20,000.00) dollars, lawful money of the United States, in hand paid to the party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the part here-

by grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand & 00/100 ($230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER,
S. A. FOSTER,
J. C. DODSON,
Manag. Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public, in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.

B. R. LANNEAU,
Notary Public."

VI.

That the evidence was and is insufficient to justify finding No. 6, which finds "that each and all of the allegations set forth in paragraph numbered XIV of plaintiff's amended complaint are untrue; and the court finds that the said J. C. Dodson at the time he entered into said contract of March 25, 1913, did have the authority to enter into same for and on behalf of the said Highland Cattle Company."

VII.

That the evidence was and is insufficient to justify finding No. 8, which finds "that the Highland Cattle Company paid to said Day and Foster $20,000.00 as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day and Foster by reason of any mis-

take upon the part of the said Highland Cattle Company, concerning said contract or its terms."

VIII.

That the evidence was and is insufficient to justify finding No. 10, which finds "that neither the sum of $20,000.00 nor any other sum is due or owing or unpaid from the defendant H. C. Day to the plaintiff."

Wherefore, the appellant prays that said decree be reversed, and that said District Court for the Southern District of California be ordered to enter a decree reversing the decision of the lower court in said cause.

WM. M. SIMS,
MADISON MARINE,
OLIN WELLBORN, JR.,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Civil No. 299. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants. Assignment of Errors. Received copy of the within this 5th day of March, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt, LeRoy M. Edwards, attorneys for defendant. Filed Mar. 5, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Cal., attorney for plaintiff.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Order.

On motion of Olin Wellborn, Jr., Esq., solicitor and counsel for complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree heretofore filed and entered herein, be, and the same is, hereby allowed, and that a certified transcript of the record testimony, exhibits, stipulations, and all proceedings, be forthwith transmitted to said United States Circuit Court of Appeals.

It is hereby further ordered, that the bond on appeal be fixed at the sum of two hundred & fifty dollars.

Dated this 14 day of March, 1917.

TRIPPET,

Judge.

[Endorsed]: Original. Civil No. 299. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs.

H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants. Order. Received copy of the within order this 14th day of March, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt and LeRoy M. Edwards, by Smith, attorneys for defendants. Filed Mar. 14, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, California.

30441-17.

United States Fidelity and Guaranty Company.

Capital Paid in Cash $2,000,000.

Total Resources over $6,000,000.

Home Office: Baltimore, Md.

In the District Court of the United States for the Southern District of the State of California.

H. F. DANBERG LAND AND LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants.

Whereas, in an action in the District Court of the United States for the Southern District of the state of California, a judgment was, on the 19th day of September, 1916, made, entered and filed by the said court in favor of the defendant, and against the plaintiff, and

Whereas, the said plaintiff is dissatisfied with the

said judgment, and is desirous of appealing therefrom to the United States Circuit Court of Appeals, 9th Judicial Circuit;

Now, therefore, in consideration of the premises, and of such appeal, the United States Fidelity & Guaranty Company, a corporation, having its principal place of business in the city of Baltimore, state of Maryland, and having a paid-up capital of two million dollars, duly incorporated under the laws of the state of Maryland, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the state of California respecting such corporations, does hereby undertake in the sum of two hundred and fifty dollars, and promise on the part of the appellant that said appellant will pay all damages and costs which may be awarded it on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of two hundred and fifty dollars, to which amount it acknowledges itself bound.

Dated at San Francisco this 29th day of March, A. D. 1917.

UNITED STATES FIDELITY & GUARANTY CO.

By H. V. D. JOHNS,

By W. S. ALEXANDER,

Attorneys in Fact.

[United States Fidelity & Guaranty Company. Incorporated 1896.]

Approved 4/5/17.

TRIPPET,

Judge.

State of California, City and County of San Francisco—ss.

On this 29th day of March, in the year one thousand nine hundred and 17, before me, M. J. Cleveland, a notary public in and for the city and county of San Francisco, personally appeared H. V. D. Johns and W. S. Alexander, personally known to me to be the persons whose names are subscribed to the within instrument, as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and their own names as attorneys in fact.

(Seal) M. J. CLEVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: 299 Civil. In the District Court of the United States for the Southern District of the state of California. H. F. Danberg Land and Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendant. Appeal Bond. Filed Apr. 4, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants.

Praecipe for Transcript.

To the Clerk of the Above Entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the appeal heretofore perfected to said court and include in said transcript the following pleadings, proceedings and papers on file, to-wit: Complaint, the defensive pleadings and joining of issue; findings of fact and conclusions of law, judgment of the court, opinion of the court, bill of exceptions, petition for writ of error; assignment for writ of errors; order allowing the writ of errors; the writ of errors and the citation.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

OLIN WELLBORN, JR.,
WM. M. SIMS,
Attorneys for Plaintiff.

[Endorsed]: Civil No. 299. In the District Court of the United States, in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants. Praecipe for Transcript. Received copy of the within this 16 day of April, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt & LeRoy M. Edwards, attys. for deft. Day. Filed Apr. 19, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Cal., attorney for plaintiff.

United States Circuit Court of Appeals for the Ninth Circuit.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiffs in Error,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants in Error.

Civil No. 299.

Order Extending Time to File Transcript on Appeal.

Good cause appearing therefor, it is hereby ordered that the time within which the plaintiffs in error in the above entitled action may file transcript on appeal, or the record thereof and docket said cause in the United

States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to and including the 2nd day of June, 1917.

Los Angeles, May 2, 1917.

TRIPPET,
District Judge.

[Endorsed]: No. Civil 299. In the United States Circuit Court for the Ninth Circuit. H. F. Dangberg Land and Livestock Company, plaintiffs in error, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants in error. Order extending time to file transcript or record on appeal. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Calif., attorney for plaintiff.

No. 3005

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

H. F. DANGBERG LAND & LIVESTOCK COMPANY,
Plaintiff in Error,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY AND FOSTER,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WM. M. SIMS,
OLIN WELLBORN, JR.,
Attorneys for Plaintiff in Error.

Filed this.....day of September, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 3005

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. F. DANGBERG LAND & LIVESTOCK COMPANY,
Plaintiff in Error,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY AND FOSTER,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This action is for the recovery of the sum of $20,000 paid by Highland Cattle Company, the assignor of plaintiff in error, to defendants in error under a mistake of fact as to the terms of a certain contract for the purchase of cattle and lands made by the agent of plaintiff's assignor with defendant.

The complaint alleges:

That plaintiff's assignor was a corporation organied and existing under the laws of the State of Nevada.

That for several months prior to March 25th, 1913, and until May 23rd, 1913, one J. C. Dodson was in the employ of said Highland Cattle Company as manager of its business of cattle raising in the State of New Mexico; that the only duties and powers of said Dodson, as such manager, were to employ laborers for the company, necessary to carry on its said cattle business, and discharge any of said laborers in his discretion, and to manage and direct said employees in the work necessary to conduct and carry on said cattle business.

That on March 17th, 1913, Dodson informed the secretary of the company that he, Dodson, could purchase of defendants all of defendants' cattle, horses, lands and cattle business equipment, situated and located in the states of Arizona and New Mexico, the cattle to count at least 9000 head with young calves thrown in and not counted, for the sum of $250,000.00.

That said secretary of said Highland Cattle Company informed said J. C. Dodson that if defendants would guarantee to deliver 9000 head of cattle, with young calves thrown in and not counted, the said secretary of said Highland Cattle Company would endeavor to have it purchase the cattle, horses, lands and cattle business equipment of defendants, situated in the States of Arizona and New Mexico for the sum of $250,000.00.

That on March 30th, 1913, Dodson met the president and secretary of the company at Reno, Nevada, and delivered to them a draft of agreement between defendants and said Dodson, as manager of Highland Cattle Company, for the sale of all cattle, horses, real estate and farming implements of the defendants for the sum of $250,000.00. Said draft contained the following: "The said party of the first part [the defendants] guarantees there to be nine thousand (9000) head of cattle, calves from October, 1912, not to be counted"; and contains also the following clause: "The bill of sale hereto attached covers nine thousand (9000) head of cattle". That Dodson then stated to the president and secretary of the company that defendants had executed a copy of the agreement then exhibited by him and that he had signed the same as manager of the company, and that the signed instrument, together with a deed of defendants' lands covering 1000 acres or more, and a bill of sale covering 9000 head of cattle, calves from October, 1912, thrown in and not counted, 90 head of horses, farming implements and cattle business equipment, all duly executed by defendants and attached to the signed agreement, had been deposited in escrow in the Bank of Duncan at Duncan, Arizona.

That on March 31st, 1913, the company, at Minden, Nevada, received from Dodson by mail an instrument in the following words and figures:

"Highland Cattle Co.
Minden, Nev.
March 25, 1913.

Bought of Day and Foster the following:

No. Head	Livestock.	Weight.	Price.	Amount.
	All their cattle, horses and land in Arizona and N. M., amt of this check			20,000.00.
	There are to be 9000 cattle, above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc. Above livestock to be delivered f. o. b. cars.....			191

and hereby acknowledge receipt of $20,000.00.

H. C. Dodson, Buyer

Day & Foster, Seller."

And afterwards, on March 31st, 1913, Highland Cattle Company paid a draft, dated March 25th, 1913, drawn upon it by Dodson to the order of the defendants in the sum of $20,000.00.

That the president and secretary of the company believed the statements made to them by Dodson, as aforesaid, were true, and further believed that the instrument received by the company by mail on March 31st, 1913, was in all respects genuine; and so believing, caused the Highland Cattle Company to honor and pay the draft aforesaid.

That on May 26th, 1913, at Lordsburg, New Mexico, the president and secretary of Highland Cattle Company requested the defendant Foster to accompany them to the bank and examine all papers and instruments held in escrow by the Bank of Duncan relating to the transaction. That Foster and the secretary of Highland Cattle Company then went to Duncan and were shown by the manager of said

bank the signed instrument in the following words and figures:

"This agreement, made this Twenty-fifth day of March in the year of our Lord One Thousand Nine Hundred and Thirteen between Day and Foster of Duncan, Greenlee County, State of Arizona, by C. A. Foster, Agent for said Day and Foster, the party of the first part, and J. C. Dodson, Manager of the Highland Cattle Company, of Minden, Nevada, the party of the second part, Witnesseth:

That for and in consideration of the sum of Twenty-thousand and 00/100 ($20,000.00) Dollars, lawful money of the United States, in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, ect., mentioned in the Deed hereto attached and in the Bill of Sale hereto attached. And the said party of the second part agrees to pay to the said party of the first part the further sum of Two Hundred and Thirty Thousand & 00/100 ($230,000.00) Dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913. The said deed and Bill of Sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned. And the said party of the first part hereby guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land more or less.

The Bill of Sale hereto attached covers Seven Thousand head of cattle, more or less, and ninety head of horses, more or less.

The said party of the first part covenants and agrees to relinquish all applications to buy and lease State Lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

(Signed) Day & Foster,
S. A. Foster.
(Signed) J. C. Dodson, Manager
Highland Cattle Co."

That they were also, at the same time, shown a bill of sale executed by defendants by S. A. Foster, Agent, purporting to sell to the Highland Cattle Company all cattle branded with certain brands and marks. That said instrument did not state or specify the number of cattle sold. That immediately after said instruments had been examined and read by the secretary of the Highland Cattle Company, defendant Foster stated to said secretary that the following words and figures contained in the said instrument received by the Cattle Company on March 31st, 1913, and above set forth, were false and fraudulent and had been inserted above the signature of the defendants after it had been executed by them, viz.: "There are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc." That defendant Foster then stated to said secretary that defendants did not own or possess on their cattle ranges

in Arizona and New Mexico any greater number of cattle than 7000 head, including young calves. That, thereupon, the secretary of Highland Cattle Company stated to defendant Foster that the company repudiated and disaffirmed the purported contract held in escrow by the bank and that it demanded the repayment of the $20,000.00 paid as aforesaid.

That Dodson had no authority, expressed or implied, to bind the said Highland Cattle Company to any agreement for the purchase of said lands, cattle or other property of the defendant.

That said Highland Cattle Company never accepted nor ratified the signed instrument held in escrow by the Bank of Duncan.

The defendant Foster was not served with process. The defendant Day, in his answer, alleges: That Dodson was the director, vice-president and manager of the Highland Cattle Company and the owner of approximately one-third (⅓) of the capital stock thereof, and also resident agent for the corporation in the States of New Mexico and Arizona.

He further alleges that said Highland Cattle Company was under the domination and control of Dodson, one Frank E. Humphrey, and one H. F. Dangberg, and was used merely as a device and agency to enable them to further their joint adventure for profit, the object and purpose of which adventure was to secure control, by purchase or otherwise, of ranches, large areas of land and cattle

and stock in the States of New Mexico and Arizona; that said Dodson was the managing agent of said corporation and syndicate composed of himself and said Dangberg and Humphrey, and as such duly authorized to purchase tracts of land, ranches, cattle, stock and other like property, and that, as such agent, said Dodson, between the 13th of January, 1913, and the 25th day of May, 1913, did purchase for the Highland Cattle Company and said syndicate, divers tracts of land, ranches, cattle, stock and other like property, and said purchases by said Dodson were well known to defendant.

He further alleges that the secretary and president of the Highland Cattle Company knew, or, in the exercise of reasonable care, would have known, that the purported draft of agreement delivered to them by Dodson was not a true copy of the signed agreement. He further alleges that Highland Cattle Company knew or, in the exercise of reasonable care, would have known that the words: "There are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc.," in the instrument, alleged in the complaint to have been received on March 31st, 1913, were interpolated and spurious.

He further alleges that by honoring and paying the draft for $20,000.00 on March 31st, 1913, the Highland Cattle Company ratified said contract; and that on or about June 21st, 1913, defendants were ready and willing and able to convey a good title to the ranches, cattle and live stock and other

personal property agreed by them to be conveyed in said contract, and on said date they made tender of such conveyances to said Highland Cattle Company, and have ever since kept such tender good.

Specification of Errors.

The following assignments of error by the trial court are relied upon:

I.

In sustaining the defendant's motion to strike out the following testimony of H. F. Dangberg, witness for plaintiff, relating to Dodson's conversation with him concerning the agreement to purchase the "Lazy B. outfit", to wit:

> "Mr. Dodson stated that the document (Plaintiff's Exhibit 3) was a carbon copy of an original that was in the Bank of Duncan, Arizona, and that it purported to be a trade and option that he had taken with the Foster and Day people on the 'Lazy Bee' outfit" (Tr. page 70).

Said testimony was stricken out on the grounds of being hearsay, incompetent, irrelevant and immaterial and not said in the presence of the defendants and was a gratuitous statement of the plaintiff's own agent (Tr. page 72).

II.

In ruling out the offer of plaintiff to establish by its witness, Dangberg, the fact that Dodson in

the presence of Mr. Humphrey and Mr. Dangberg, handed them the document in evidence (Plaintiff's Exhibit 3) and stated to them at that time, that the original of this contract, which he and defendant Foster had signed, was placed in escrow in the Duncan Bank, and that there were to be bills of sale and other papers also deposited in the bank. The court refused the offer and stated that any such testimony as offered had been ruled out (Tr. pages 72-73).

III.

In sustaining defendant's objection to the question asked F. E. Humphrey, a witness for plaintiff, as to what, if anything, Dodson said to him relative to said contract (Plaintiff's Exhibit 3) at the time same was handed to witness by Dodson in the presence of Dangberg (Tr. pages 112-113); to which question witness would have testified that Dodson stated that the document was a carbon copy of the signed original that was in the Bank of Duncan, Arizona.

IV.

That the evidence was and is insufficient to justify finding No. 2, which finds that "During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the State of New Mexico and in Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one

J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the State of New Mexico, and was manager of its business in the said States of New Mexico and Arizona and during all of the aforesaid times was acting as the manager of all its business in the States of New Mexico and Arizona."

V.

That the evidence was and is insufficient to justify finding No. 3, which finds that "On or about the 25th day of March, 1913, the Highland Cattle Company, a corporation by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day and Foster, which said contract was and is in the words and figures as follows:

"This agreement made this twenty-first day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee County, State of Arizona, by S. A. Foster, agent of said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part.

Witnesseth: That for and in consideration of the sum of $20,000.00 dollars, lawful money of the United States, in hand paid to the party of the

first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of $230,000.00 dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER,
S. A. FOSTER,
J. C. DODSON,
Manag. Highland Cattle Co.

State of Arizona,
County of Greenlee.—ss.

Before me, B. R. Lanneau, a notary public, in and for the County of Greenlee, State of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribd to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.

B. R. LANNEAU, Notary Public."

VI.

That the evidence was and is insufficient to justify finding No. 6, which finds "that each and all of the allegations set forth in paragraph numbered XIV of plaintiff's amended complaint are untrue; and the court finds that the said J. C. Dodson at the time he entered into said contract of March 25, 1913, did have the authority to enter into same for

and on behalf of the said Highland Cattle Company."

VII.

That the evidence was and is insufficient to justify finding No. 8, which finds "that the Highland Cattle Company paid to said Day and Foster $20,000.00 as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day and Foster by reason of any mistake upon the part of the said Highland Cattle Company, concerning said contract or its terms."

VIII.

That the evidence was and is insufficient to justify finding No. 10, which finds "that neither the sum of $20,000.00, nor any other sum, is due or owing or unpaid from the defendant H. C. Day to the plaintiff."

Argument.

I.

IT WAS ERROR FOR THE TRIAL COURT TO STRIKE OUT AND REFUSE TO RECEIVE TESTIMONY OF STATEMENTS MADE BY DODSON TO THE PRESIDENT AND SECRETARY OF THE HIGHLAND CATTLE COMPANY ON MARCH 30th, 1917, AS TO THE NATURE AND CONTENTS OF THE AGREEMENT SIGNED BY DODSON AND DEPOSITED IN ESCROW WITH THE BANK OF DUNCAN.

One of the principal issues in this case is whether or not Highland Cattle Company ratified the agreement with defendants signed by Dodson.

It is elementary that ratification of the act of an agent can only be had when the principle has full knowledge of all material facts.

2 C. J. 476;

Owings v. Hull, 9 Pet. (U. S.) 607, 629.

The statements of Dodson to the officers of the corporation therefore become material and relevant, tending to show what knowledge the president and secretary of the corporation had of the transaction at the time they accepted and paid the draft for $20,000.00. Such evidence is not hearsay. It was not sought to be introduced for the purpose of establishing the *truth* of the statements by Dodson, but simply the *fact* that he made such statements.

That evidence of this nature is so admissible is held in the case of

Davenport Savings Fund & Loan Association v. North American Fire Insurance Co., 16 Iowa 74, 77.

II.

THERE IS NO EVIDENCE TO JUSTIFY THE FINDING THAT THE HIGHLAND CATTLE COMPANY WAS ENGAGED IN THE BUSINESS OF BUYING AND SELLING CATTLE AND CATTLE RANCHES IN THE STATES OF NEW MEXICO AND ARIZONA; NOR IS THERE ANY EVIDENCE TO JUSTIFY THE FINDING THAT J. C. DODSON WAS A LARGE STOCKHOLDER IN SAID COMPANY AND WAS MANAGER OF ITS BUSINESS IN THE STATE OF ARIZONA.

The record nowhere discloses any evidence that the Highland Cattle Company was engaged in the

business of buying and selling *cattle ranches.* The only evidence as to its business is that it was engaged in the buying and selling of cattle (Tr. page 82).

That the corporation was engaged in business in the State of Arizona, or had transacted any business in said state, is likewise unsupported by any evidence. The record shows that the corporation had entered and was doing business only in the State of New Mexico. There is no evidence that Dodson at any time transacted any business in the State of Arizona except that pertaining to the transaction involved in the case at bar.

That Dodson was, in fact, not a stockholder of the corporation appears from the evidence that, although he subscribed for 66,666 shares (Tr. page 85) he had not invested any money in the corporation nor paid for said stock (Tr. pages 115-116) and the certificate for the stock subscribed by him was never delivered to him (Tr. page 84).

III.

THERE IS NO EVIDENCE THAT DODSON WAS AUTHORIZED BY THE HIGHLAND CATTLE COMPANY TO ENTER INTO THE CONTRACT HE SIGNED FOR THE PURCHASE OF THE "LAZY BEE" LANDS AND CATTLE.

It is fundamental in the law of agency that the power of every agent to bind his principal rests upon the authority conferred upon him by that

principal, and this authority as to third persons consists of:

(a) The powers intentionally conferred;

(b) Those incidental to or implied from the main powers conferred;

(c) Those which custom and usage have added to the main powers;

(d) Those which the principal has caused, as by a previous course of dealing, persons dealing with the agent to believe that the principal has conferred, as well as power, the exercise of which by the agent, the principal is by his conduct estopped to deny;

(e) Or power, the exercise of which the principal has subsequently approved and ratified.

2 C. J. 560.

(A) No Power to Enter Into the Contract Signed Was Intentionally or Expressly Given Dodson.

There is not a word of evidence in the record showing that Dodson was ever given or had ever exercised any general authority to buy or sell cattle outfits, including cattle, lands and equipment. No such resolution or other authority from the corporation is in evidence.

The only evidence of the power intentionally or expressly conferred by the corporation upon Dodson with reference to the transaction in qusetion is found in the testimony of Dangberg as to the instructions given by him and Humphrey, as secretary

and president respectively of the corporation, to Dodson, and consists of the instructions given Dodson by Dangberg and Humphrey as testified to by them and as shown by the letters from Dangberg and Humphrey to Dodson and from Dodson to Dangberg and Humphrey.

Mr. Dangberg testified:

> "Mr. Humphrey and myself met Dodson at Lordsburg, about the middle of February, 1913. I believe at that time we talked over with him about looking up other cattle deals and reporting to us, and seeing if we could get any options, and reporting to us. We talked over the 'Lazy Bee' deal with him and directed him to see what kind of an option we could get on it on the basis of so much a head. Mr. Humphrey and myself, as president and secretary of the Highland Cattle Company, told him to go ahead. He told us he could get the 'Lazy Bee' matter settled for $27.00 per head, October calves thrown in, and the lands and other holdings of the company to go in with the trade. I told him if he could buy the outfit on that basis to go and get an option and get the option extended so we could get back to Nevada and arrange our finances to take over the deal on the basis as he had reported it to us, telling him also to arrange the payments as small as he could, giving us time and opportunity to fix our finances in regard to handling this deal; that was about the extent of our conversation.
>
> About the 13th day of March, 1913, Dodson and myself went to Santa Fe. We discussed the 'Lazy Bee' matter and he presented the thing to me in the same way, and stated he thought he could buy an option upon the 'Lazy Bee' on the basis of $27.00 per head, October calves thrown in, and the rest of the holdings

to go in and he thought he could get a reasonably small payment down and we could finance it and put it over. I told him if he could make the deal on that basis, I could get the boys in Nevada to stand behind the deal, and we could finance it and put it over. I, as secretary of the company, gave him no other authority than just stated in the two conversations mentioned" (Tr. pp. 76, 77).

"He talked of it in that way, explaining to me that it was on the basis of $27.00 per head, that the deal was $250,000.00, but that the cattle —anything less than the nine thousand head of cattle would count off the lump sum of $250,000.00, on that basis of $27.00 a head, making the ranches and the holdings $7000 secured in; that is as I explained the deal" (Tr. page 88).

Dodson's letters to Dangberg and Humphrey (Tr. pages 78-126) corroborate the testimony of Dangberg. In these letters Dodson advised that he can trade with defendants along the lines mapped out by Humphrey, the president of the corporation.

The letters from Dangberg and Humphrey to Dodson further corroborate the testimony of Dangberg that Dodson had no authority to do other than secure an option upon the "Lazy Bee" outfit.

In these letters the following expressions were used with reference to the contemplated purchase of defendants' business:

"Am truly hopeful that you will have things lined up for the 'Busy Bee' by the time Frank and I reach there" * * * (Tr. page 92).

"We are both anxious for the 'Lazy Bee' deal and hope to hear from you before the week ends regarding same" (Tr. page 95).

"Trust that will be prepared with all finances necessary to put over the 'Lazy Bee' deal" (Tr. pages 97-98).

"Hope you get a tie up on the 'Bee' " (Tr. page 99).

"Asking you the last possible data you had on making the 'Lazy Bee' deal" (Tr. page 100).

"I trust to hear from you and to the effect that you have made the 'Lazy Bee' deal along the lines that we had talked over" (Tr. page 102).

"We are to be in Carson together tomorrow to decide on the 'Lazy Bee' matter" (Tr. page 107).

"When I go to Reno, will figure out whether we can handle the 'Lazy Bee' or not" (Tr. page 114).

We submit that there is nothing in these letters inconsistent with the testimony of Dangberg that Dodson's authority was simply to secure an option for the "Lazy Bee" outfit for $250,000.00 on terms, with a guarantee of 9000 head of cattle, young calves thrown in and not counted, together with their lands and equipment in Arizona and New Mexico.

The most adverse interpretation would indicate that Dodson was authorized to make the purchase of the lands and cattle of the defendants upon the terms and conditions specified by the president and secretary of the corporations, as testified to by Dangberg.

That the actual authority conferred upon Dodson by the corporation was limited, as above contended,

is further evidenced by the fact that Dodson not only failed to disclose to the corporation the true terms of the contract signed, but by means of the purported carbon copy of the signed contract and the altered receipt or advice made it appear that he had entered into the contract with the defendants in line with his authority. That he had exceeded such authority is further evidenced by the testimony of defendant Foster that Dodson later wanted him to change the contract so as to guarantee 9000 head of cattle instead of 7000, more or less (Tr. page 139).

(B) No Power to Purchase the Lands and Cattle of the Defendants Was Conferred Upon Dodson by Reason of His Position as Manager of the Corporation's Ranch or Business in New Mexico.

The evidence shows that Dodson was not elected general manager and superintendent of the corporation (Tr. page 79). Conceding, however, for the purpose of this argument, that he was acting as such general manager and superintendent, the by-laws of the corporation, defining the duties of the superintendent and manager (Tr. page 111) confer no power upon such superintendent and manager to bind the corporation in a transaction such as is involved in the case at bar. His duties are defined as of a general supervising nature, and it especially states that he shall be subject to the orders of the board of directors.

It is a fundamental principle of law that a corporation is bound by the acts of its manager only when acting within the scope of his authority as such manager.

> "An act pertaining to its ordinary business is binding upon the corporation when performed by the president and secretary, yet no such presumption prevails when the act done by such officers does not fall within the scope of power conferred upon and usually exercised by them as part of the ordinary business of the corporation."
>
> *Mulligan v. Smith,* 59 Cal. 206, 224-5.

We submit that it is not within the scope of the authority of even a general manager of a corporation engaged in the business of buying and selling cattle and owning about 3000 head of cattle (Tr. page 170), to purchase for the corporation the entire properties, including over 1000 acres of land and 7000 head of cattle, of parties engaged in the same business.

In the case of

> *Blen v. The Bear River and Auburn Water and Mining Co.,* 20 Cal. 602-613,

it was held that the purchase of land, with a view to extending the operations of a corporation, is not a matter within the ordinary course of business of said corporation, and its president, as such, has no authority to bind the corporation by a contract of purchase.

That a general manager of a corporation has no implied authority to purchase a rival business is held in the case of

Manhattan Liquor Co. v. Magnus, 43 Tex. Civ. Ap. 463.

The court said:

> "We have no difficulty in concluding that within its charter or power the corporation could have established and conducted more than one retail liquor store in the city, * * * but it does not follow that Chan, as its general manager and under his general authority as such and in the absence of express authority from its directors, could purchase and conduct another and distinct establishment from the one already established."

The authority of the general manager of a corporation, organized for the care of live stock and its sale to a certain market to conduct its ordinary business, is not broad enough to empower him to sign a petition for paving a city street and thus bind the real estate of the corporation abutting thereon with the cost of the improvement.

Trephagen v. South Omaha, 69 Neb. 577.

Dodson's position as vice-president and director of the corporation, we submit, did not confer any authority upon him to transact any business for the corporation unless expressly authorized thereto. The provision of the By-Laws conferring the powers of the president upon the vice-president in the former's absence (Tr. p. 108) must be construed as referring to the president's absence from its prin-

cipal office in Nevada, the corporation having been organized under the laws of that State.

It is likewise well settled that individual stockholders of a corporation cannot, unless expressly authorized, bind the corporation.

7 R. C. L. 623.

And it cannot be maintained that Dodson's appointment as state agent, in charge of its principal place of business in New Mexico, conferred upon him any greater authority than he had by reason of his position as manager of the corporation's ranch and business of buying and selling cattle.

(C) There Is No Evidence That Power to Enter Into the Contract Signed Was Conferred Upon Dodson as Manager of the Ranch and Business of the Corporation by Reason of Any Custom or Usage.

The record is absolutely devoid of any evidence as to any custom or usage relating to Dodson's power to purchase cattle-lands and cattle.

(D) By No Previous Course of Dealing Had the Corporation Caused Defendants to Believe That Dodson Had Power to Enter Into the Contract Signed; Nor Is It Estopped to Deny Such Power in Dodson.

There is absolutely no evidence that Dodson, at any time prior to the transaction in question, purchased land or cattle ranches and equipment or cattle outfits, for the corporation. The only evidence as to any purchases by Dodson shows that, *prior to the incorporation of the Highland Cattle*

Company, Dodson, *in his own name,* purchased cattle from one Wilson and from one Robinson or Robson (Tr. p. 110). The Wilson deal involved 1200 or 1500 cattle and the Robinson deal about 2500 cattle (Tr. p. 120). These contracts, after the incorporation of the company, were assumed by it and the purchase price paid.

There is absolutely no evidence that Dodson made any purchases of cattle on behalf of the corporation *after it was incorporated,* and no attempt was made to show that Dodson, at any time, had purchased lands, cattle ranches or cattle ranch equipment for the corporation.

The only evidence as to defendants' knowledge of any purchases made by Dodson is that defendant Foster had a conversation with Wilson concerning the sale by him of cattle to Dodson and that Wilson informed him that Dodson represented the Highland Cattle Company (Tr. p. 146).

This deal was made with Wilson by Dodson for himself in November, 1912, before the incorporation of the company (Tr. p. 110). In February, 1913, after the incorporation of the company, it assumed the Wilson contract (Tr. p. 123) and paid for the same by draft drawn upon it by Dodson under instructions from the president, Humphrey (Tr. p. 130).

We submit there is nothing in either the Wilson or Robson transactions which could justify the defendants in assuming that Dodson was clothed

with authority to purchase the entire outfit of defendants, who were then engaged in a similar and rival business, and which outfit comprised not only cattle in practically five times the number of those involved in the Wilson deal, but also over a thousand acres of land, farming implements and cattle ranch equipment.

As we have shown that, under the authorities, it is not within the ordinary scope of authority of a general manager of a corporation as such to purchase land to extend its business or to purchase a rival or similar business, the defendants could not rely upon the fact that Dodson was manager of the corporation's ranch and business of buying and selling cattle in New Mexico as indicating that he had authority to enter into the contract in question, especially where the evidence shows that Dodson at no time had made a *similar* contract for the corporation.

> "In order to establish implied authority, the preponderance of evidence must show *similar* transactions in which the acts of the agent were authorized and ratified."
>
> *Robinson v. Nevada Bank,* 81 Cal. 106.

As no implied or general authority to make the contract in question existed in Dodson by reason of his office as manager or by reason of any prior course of dealing known to defendants, defendants were bound to know that express and special authority of the corporation was necessary to empower Dodson to enter into a binding contract.

The general rule of agency that a person who deals with an agent is bound to take notice of, and is therefore presumed to know, the extent of the agent's authority, is fully applicable to a person dealing with another as the agent of a corporation. So when one deals with an agent of a corporation solely upon the latter's representations as to his own authority, the liability of the corporation depends not on such representations but on the actual authority conferred on the agent in the particular transaction.

7 R. C. L., pages 625-6.

The Supreme Court of Arizona in

Franklin v. Havalena Mining Co., 16 Ariz. 200-208,

quotes with approval Cook on Corporations, Section 719:

> "A general manager does not displace them (the directors), and a person dealing with a corporation is bound to take notice of that fact."

> "The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal and like a railroad crossing suggest the duty to 'stop, look and listen', and if he would bind the principal he is bound to ascertain, not only the fact of the agency, but the nature and extent of the authority."

Brutinel v. Nygren, 154 P. 1042 (Ariz.).

> "There is a general rule that when one deals with an agent, it behooves him to ascertain cor-

rectly the scope and extent of his authority to contract for and in behalf of his alleged principal, for under any other rule it is said every principal would be at the mercy of his agent however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes, before he closes the bargain with him."

Morganton Bank v. Hay, 143 N. C. 326, 330; 55 S. E. 811.

"The extent to which a principal shall authorize his agent is completely within his determination, and a party dealing with the agent must ascertain the scope and reach of the powers delegated to him and must abide by the consequences if he transcends them."

Porges v. U. S. Mortgage, etc. Co., 203 N. Y. 181, 188; 96 N. E. 424.

"The attorney has only such authority as the principal has chosen to confer upon him, and one dealing with him must ascertain at his own risk whether his acts will bind the principal."

Golinsky v. Allison, 114 Cal. 458, 460; 46 P. 295.

A general agent cannot enter into contracts of an unusual and extraordinary nature without special authority.

Shaw v. Stone, 1 Cush. (Mass.) 228;

Ricker Nat. Bank v. Stone, 21 Okla. 833.

Certainly, it cannot be maintained that the purchase of 7000 cattle and over a thousand acres of land, together with farming implements and cattle ranch equipment, is a usual and ordinary transaction in the business of a corporation engaged in buying and selling cattle, who, at the time, owned only about 3000 cattle. On the other hand, we contend that it most obviously is an unusual and extraordinary transaction involving the purchase of a cattle ranch, cattle and outfit over twice the size of that which Dodson was managing.

The doctrine that a person dealing with an agent is bound to ascertain the extent of his authority is particularly applicable where the agent is dealt with the first time.

Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

In addition to his knowledge of the Wilson deal, which we submit should not justify the defendant Foster in assuming that Dodson had authority in the premises, the only evidence as to Dodson's authority is the representation made to Foster and Lanneau by Dodson himself.

A person dealing with an agent should ascertain the extent of his authority from the principal, and he cannot rely upon the agent's statement or assumption of authority.

2 C. J. 563, and cases cited.

It is a well settled rule of law that those dealing with a known agent must do so at their peril as to his authority.

Bank of Commerce v. Baird Mining Co., 13 N. M. 424, 429;

Franklin v. Havalena Mining Co., 16 Ariz. 200;

Brutinel v. Nygren, 154 P. 1042 (Ariz.).

It therefore became incumbent upon the defendants to ascertain the extent of Dodson's authority to enter into the contract in question. Foster knew Dodson claimed to represent the Highland Cattle Company in the transaction, and in a deal the size and importance of the one in question, as a prudent business man he either should have required Dodson to produce evidence of his authority to enter into the contract or made inquiry by wire or mail of the corporation at its home office. Had he done so, he would have ascertained the extent of Dodson's authority, viz: to purchase defendants' outfit, consisting of lands, cattle-ranch equipment, etc., and cattle with a guarantee of at least 9000 head of cattle, October calves thrown in and not counted.

If he made no inquiry but chose to rely on Dodson's statements, he is chargeable with knowledge of Dodson's authority, and his ignorance of its extent will be no excuse to him, and the fault cannot be thrown upon the corporation which never author-

ized the contract, although it was careless in reposing confidence in Dodson.

2 C. J., 564;
Bond v. Pontiac etc. R. Co., 62 Mich. 643;
Hurley v. Watson, 68 Mich. 531;
Gregory v. Loose, 19 Wash. 599.

As Dodson's authority was a limited authority to purchase the defendants' outfit for $250,000.00 with a guarantee of at least 9000 head of cattle, October calves not counted and thrown in, together with over a thousand acres of land, implements, equipment and improvements, he had no authority to bind the corporation to a purchase on any different terms.

In the case of

Starbird v. Curtiss, 43 Me. 352,

it was held that an agent authorized to purchase a one-sixteenth part of a ship at $40.00 a ton did not bind his principal by purchasing the same at $44.00 per ton.

Likewise in

Day v. Snyder, 130 S. W. 716,

it was held that where terms and conditions of the purchase are limited by the principal, the agent has no authority to purchase differently.

(E) The Contract Signed by Dodson Was Never Ratified or Approved by the Highland Cattle Company.

The evidence shows that, after he signed the contract in question, Dodson, on March 30th, 1913,

presented to the president and the secretary of the corporation a purported carbon copy of the contract in question, which copy contained a guarantee of 9000 head of cattle, October calves thrown in and not counted (Tr. p. 70), and on March 31st, 1913, the corporation received the advice or receipt (a photographic copy of which is found in the transcript, p. 74) which advice or receipt contained the statement: "There are to be 9000 cattle above October calves", and that thereupon the secretary of the corporation honored and paid the draft for $20,000.00.

Mr. Dangberg testified as follows (Tr. page 131):

> "At the time I paid the draft of $20,000 drawn by Dodson in favor of Day and Foster, it was paid out upon the advice which corresponded with his carbon copy of contract, and I believed the carbon contract was the contract upon which the money was paid."

It is in evidence that neither the president nor the secretary of the corporation saw the original contract until May 26th, 1913 (Tr. page 75).

The evidence clearly shows, without contradiction, that at the time the draft for $20,000.00 was paid by the secretary of the corporation, neither he nor the president had full knowledge of all the material facts to the transaction, particularly the material fact as to the number of cattle involved in the purchase.

Ratification of the act of an agent can only be had when the principal has full knowledge of all material facts.

2 C. J., 476 (and cases cited).

In the case of

McGlassen v. Tyrrell, 5 Ariz. 51,

it was held that to render the ratification of an agent's act effective, the principal must have been fully aware of every material circumstance of the transaction.

In

Brown v. Rouse, 104 Cal. 672,

where the defendant was a married woman whose husband, under an invalid power of attorney, mortgaged her property, and the defendant while residing in Oregon, through her California agent, paid installments of interest on the note and mortgage, believing that the note and mortgage bound her, it was held that such payment did not constitute ratification,

> "for the very essence either of election or ratification is that it is done advisedly with full knowledge of the party's rights".

In the case of

Dean v. Bassett, 57 Cal. 640,

it was held that the principal is not bound by an approval of an act already done, made under a misapprehension of the real nature of the facts.

To the same effect are the following:

Schutz v. Jordan, 141 U. S. 213;
Pease v. Fink, 3 Cal. App. 371;
Brown v. Wrightman, 5 Cal. App. 388.

In the last case, a traveling salesman agreed with a customer that the first order shipped, which was claimed to be defective, should be retained by the customer and that the price thereof be deducted from the price of the second order. The court held that the filling of the second order by the principal, without knowledge of the salesman's agreement, did not constitute ratification.

In

Clement v. Young McShea Amusement Co., 70 N. J. Eq. 677,

where the agent had authority to lease principal's property for one year and leased the same for three years, it was held that the acceptance of the rent, etc., did not constitute ratification, the fact of the three-year lease not being known to the principal.

In the case of

Valley Bank of Phoenix v. Brown, 9 Ariz. 311,

the bank, without authority, made a loan of Brown's money upon certain securities. The interest was paid to Brown. The bank's cashier suggested that Brown look over the securities. Brown did not examine same but returned them to the cashier, who assured her the securities were perfectly good.

After learning the facts as to the nature of the securities, Brown tendered the interest and repudiated the bank's act in the matter. The court held that a lack of knowledge as to the character or the valuation of the securities was a material circumstance and a ratification without it was not binding unless ignorance resulted from wilfulness and not mere carelessness.

IV.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE FINDING THAT THE HIGHLAND CATTLE COMPANY PAID THE $20,000.00 UNDER AND ACCORDING TO THE TERMS OF THE SIGNED CONTRACT, AND THAT THE SAID PAYMENT WAS NOT MADE BY REASON OF ANY MISTAKE ON THE PART OF THE COMPANY CONCERNING SAID CONTRACT OR ITS TERMS.

The evidence shows that the draft for $20,000.00 was honored and paid by the secretary of the corporation after Dodson had delivered to the president and the secretary a purported carbon copy of the contract signed, which copy contained a guarantee of 9000 head of cattle, October calves thrown in and not counted (Tr. page 70), and after receipt by said secretary of the advice or receipt containing the statement: "There are to be 9000 cattle above October calves"; and that when said payment was made said secretary believed the carbon copy to be a correct copy of the signed contract and believed said advice or receipt to be genuine (Tr. page 131).

There is no contradictory evidence in the record as to these facts, and we submit, that, in view of the fact that the corporation had no actual knowledge of the real terms of the signed contract and the fact that Dodson, in signing the contract in question, was not acting in pursuance or within the scope of his authority, it cannot be maintained, as a matter of law, that Dodson's knowledge must be imputed to the corporation.

> "The general rule that charges a principal with knowledge of facts known to his agent cannot be invoked, when the fact with which the principal is to be charged is the unauthorized act or agreement of the agent, whose knowledge thereof is sought to be imputed to the principal. To hold a principal chargeable with notice of the unauthorized agreement of the agent, and in this way raise the issue of estoppel by ratification on the part of the principal, would in effect destroy the rule which relieves the principal from liability for the unauthorized act or agreement of his agent."
>
> *Weathersby v. Texas, etc., Lumber Co.,* (Tex. Civ. A) 146 S. W. 243, 247.

V.

THE $20,000.00 HAVING BEEN PAID UNDER A CONTRACT MADE BY AN UNAUTHORIZED AGENT AND UNDER A MISTAKE OF FACT AS TO THE TERMS OF SAID CONTRACT, PLAINTIFF, AS ASSIGNOR OF THE CORPORATION, IS ENTITLED TO RECOVER THE SUM PAID.

The principle of law that money paid under mistake of a material fact without consideration

can be recovered back is so well established that we refrain from any lengthy discussion thereof.

To constitute a voluntary payment, so as to preclude recovery, it must be made with full knowledge of all material facts.

30 Cyc. 1300.

As we have heretofore endeavored to demonstrate, the evidence clearly shows that payment of the $20,000.00 was made by the corporation under mistake as to a most material term of the contract signed, namely, the number of cattle guaranteed in the proposed purchase.

In conclusion, we submit that Dodson had no express or implied authority, by virtue of his position as vice-president, director, resident agent or manager of the corporation, to enter into the contract in question, which contract, in view of the size of the corporation's business in New Mexico and the fact that Dodson had not theretofore made any purchase for the corporation of any cattle ranches or outfits, we submit, was unusual and extraordinary; that the only authority to Dodson was a limited authority to secure an option, or at most to purchase, on the terms which he reported to the president and the secretary of the corporation; that it was incumbent upon the defendants to apprise themselves of the extent of Dodson's authority, and that their failure so to do

was at their own peril; and that the payment of the $20,000.00, having been made without full knowledge of all material facts of the transaction, did not constitute ratification but was made under mistake as to the actual facts and circumstances of the transaction, namely, as to the number of cattle involved in the purchase; and that consequently, under the law, plaintiff, as assignor of the corporation, is entitled to recover the sum so paid under mistake.

We respectfully urge, therefore, that the judgment of the trial court be reversed and the cause remanded.

Respectfully submitted,

WM. M. SIMS,

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Attorneys for Plaintiff in Error.

No. 3005.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

H. F. Dangberg Land & Live-stock Company,
Plaintiff in Error,

vs.

H. C. Day and S. A. Foster, Co-Partners, Doing Business Under the Firm Name and Style of Day & Foster,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR DAY.

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STATEMENT OF CASE.

The plaintiff in error has omitted to prefix to its brief a statement of the case, as required by the rules of this court, but in lieu thereof has given merely a digest of the complaint. Moreover, in such argument on the facts as appears in its brief, plaintiff in error has proceeded in disregard of the elementary rule of

appellate practice that if there is substantial evidence in the record to support the findings the case will not be reversed on the facts,—a rule not necessary to invoke here. Indeed, plaintiff in error, with charming naivete, has resorted to the novel device of referring only to the evidence inconsistent with the findings. Under the circumstances, it will be necessary for us to make a statement of the case with somewhat more fullness than is usual in the brief of a defendant in error.

The action was brought in the United States District Court for the Southern District of California by the plaintiff in error as assignee of the Highland Cattle Company, a Nevada corporation. The defendants named were H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster. This firm did business in the states of Arizona and New Mexico, but not in the state of California, and the transactions in question occurred in the said states of Arizona and New Mexico. The defendant Day is a resident of Pasadena, and he alone was served with process.

The action was for the recovery of the sum of twenty thousand dollars paid by the Highland Cattle Company to Day and Foster, as part payment on a contract for the purchase of land and cattle, together with some horses, as well as certain mill sites which gave control of miles of open range, all being situate in the states of Arizona and New Mexico, and known as the Lazy B ranches and cattle, or the Lazy B outfit. The contract in question was entered into at Duncan, Arizona, on March 25th, 1913, on behalf of

Highland Cattle Company [Tr. pp. 137, 138], but delivery of the property was not to be made until in June of that year. The contract was made by one J. C. Dodson, manager of the company; and the main question in the case is whether Dodson had authority, actual or apparent, to enter into the contract.

When the contract was executed it was placed in escrow with the Bank of Duncan, at Duncan, Arizona. The contract provided for a purchase price of $250,000.00, $20,000.00 of which was to be paid down. This payment was made by a draft drawn by Dodson on the Highland Cattle Company at Minden, Nevada, for the sum of $20,000.00 in favor of Day and Foster. [Tr. p. 156.] Foster receipted for the payment. Dodson forwarded the receipt to H. C. Dangberg, secretary of the company [Tr. p. 73], (who, with Dodson and Humphrey, owned all the stock except a few qualifying shares). Dodson delivered in person to Dangberg and Humphrey, what purported to be a carbon copy of the contract. [Tr. pp. 70, 112.] This carbon copy, according to the testimony of Humphrey and Dangberg, varied from the original in escrow in that it provided for a guaranty of the delivery of 9,000 head of cattle [Tr. p. 71], while, in fact, the original was in general terms and provided for no specific number. [Tr. p. 58.] The receipt, when it reached Dangberg, also (according to the same persons), had matter interpolated in different colored ink from the body thereof [Tr. pp. 74, 157], reciting that the payment was on account of purchase price for 9,000 head of cattle. Humphrey and Dangberg both testified that they believed the

receipt as altered and the carbon copy of contract were true copies [Tr. pp. 128, 131], and that the contract was, among other things, for 9,000 head of cattle. In this belief they testified they paid the draft on March 30th, 1913. [Tr. p. 131.] Messrs. Day and Foster were both entirely ignorant of the alleged frauds of Dodson upon his associates. [Tr. p. 157.] The exact number of cattle owned by Day and Foster was unknown, as they had not been counted for thirty-one years, but the number was estimated to be about 7,000 head. [Tr. pp. 134-137.] It is never possible, in buying an entire "outfit" and "brand" of cattle running wild on the open range, to do more than make a rough estimate of the number.

The theory of the complaint is that Dodson had no authority to enter into the contract, and payment of the draft was made in ignorance of the fact that the contract did not call for 9,000 head of cattle.

The allegations regarding Dodson's want of authority were as follows:

"That at all times herein mentioned the said Highland Cattle Company was engaged in the business of cattle raising in the state of New Mexico. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of the said Highland Cattle Company as manager of its cattle business in the state of New Mexico; that the only duties and powers of said J. C. Dodson, as such manager, were to employ laborers for said Highland Cattle Company, necessary to carry on its said cattle business, and to discharge any

of said laborers in his discretion, and to manage and direct said employees in the work necessary to conduct and carry on said cattle business." [Tr. pp. 26-27.]

The principal findings attacked are the second and third. The other specifications of error relate to matters of minor detail. The second finding is as follows [Tr. p. 58]:

"2. During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the states of New Mexico and Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and a large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona; and during all the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona."

The third finding is in part as follows:

"3. The court finds that on or about the 25th day of March, 1913, the Highland Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day & Foster, which said contract was and is in words and figures as follows:" (Here follows a copy of the true contract.) [Tr. p. 58.]

The effect of the evidence bearing upon Dodson's authority (and the evidence will presently be summarized), may be stated in five propositions:

1. The Highland Cattle Company went to Arizona and New Mexico with the purpose of buying ranches and cattle and of getting control of the range; and it was engaged in carrying out that purpose when the contract with Day & Foster was made, and said contract was in furtherance of that purpose.

2. All the capital stock of the Highland Cattle Company was owned by Dangberg, Humphrey and Dodson in equal shares (except a few qualifying shares) and the business carried on under the style of Highland Cattle Company was carried on without corporation action and conducted as a partnership.

3. Dodson was general manager of the company's business, and as such had apparent authority to close the Lazy B deal and to draw the $20,000.00 draft, and he also had express authority to make such deal. It may be that Dodson had private instructions not to close unless there were 9,000 head of cattle.

4. The conduct of Dangberg and Humphrey when the alleged fraud was discovered constitute an admission that Dodson acted with authority.

5. Attempts to conceal the real facts (and the facts were peculiarly and exclusively within their knowledge) on the part of Dangberg and Humphrey and inconsistencies and improbabilities in their testimony warranted the court in inferring that Dodson had full

authority in the premises unembarrassed by private instructions.

The most important evidence in the case consists of letters that passed between Dangberg and Dodson, between January and May, 1913; and testimony given by Dangberg in a grand jury investigation of Dodson's frauds, said investigation occurring in New Mexico in September, 1913, and testimony of Dangberg at a *habeas corpus* proceedings instituted by Dodson and held June 13, 1913, in New Mexico. It should be here pointed out that during all the times in question Dangberg and Humphrey resided at Minden, Nevada (and were not in either Arizona or New Mexico, except twice, each time for a few days), while Dodson resided and was in New Mexico, near the Arizona line, practically all the time, and was general manager of the business of the three associates carried on under the name and style of the Highland Cattle Company in those states. It should also be noted that on the day before the Lazy B contract was signed [Tr. pp. 109, 124], Dodson made a contract to sell cattle to a firm known as Kidwell & Caswell with the express approval of Dangberg and Humphrey, and the cattle to be delivered under said contract were to be in part Lazy B cattle. [Tr. p. 169.] Day and Foster deposited in the Bank of Duncan bills of sale, deeds and abstracts of title [Tr. pp. 149, 150, 151], and the court found "that Day and Foster were ready and willing, and able, at all times to perform all of the terms and

conditions upon their part under the said contract of March 25, 1913." [Tr. p. 61.]

1. Nature and Purpose of the Business Carried on by the Highland Cattle Company in the States of Arizona and New Mexico.

On March 5, 1913, Dangberg wrote from Minden, Nevada, to Dodson at El Paso:

"also stated in telegram to take at least fifty thousand acres, *or sufficient to secure the range,* but from reading your letter, note that the Lazy B have taken up much of the territory and that we went over, and all of which we have given consideration, and *can see the importance of holding the Lazy B outfit in order to have complete control of the range.*" [Tr. p. 101.]

Dangberg's letter was apparently in answer to a letter from Dodson under date of February 26, 1913, in which Dodson wrote, "If James don't want to come in arrange with Frank so we can buy this and less sell down so we will get control of the range." [Tr. p. 78.]

Dangberg had previously written from Minden, Nevada, February 4, 1913, to Dodson at Lordsburg, New Mexico, as follows:

"While in the city seeing James, we will have other connections, providing James does not come in, and also note your propositions on the state land, which certainly looks good for big protection to the range." [Tr. p. 93.]

On February 28, 1913, Humphrey had written Dodson from San Francisco (after referring to his intention to go to Reno and "figure out whether we can handle the Lazy B or not") as follows:

"Of course if we could sell them all it would be wise to get their land and make a better plant of it for to run cattle and grow them up, and if there is any way we can pull it off we will try and do it." [Tr. p. 114.]

In connection with this, it is proper to mention that besides owning a thousand acres of land Day and Foster controlled the country about twenty miles each way up and down the Gila River north and south to a big range of mountains [Tr. p. 132]; that the country was open range and Day and Foster controlled it by wells protected by deeded land. [Tr. p. 134.]

Dangberg wrote on March 2, 1913:

"Just sent you a telegram, and which this is to confirm, 'Take fifty thousand at least. More if necessary. Your judgment best, depending on B deal.'" [Tr. p. 107.]

2. Highland Cattle Company's Manner of Doing Business (and Herein of Looking Through the Corporate Form.)

The Highland Cattle Company was organized in January, 1913, and appears to have been designed and used as a mere agency for carrying on the business of the Arizona and New Mexico projects of Messrs. Dangberg, Humphrey and Dodson. After the initial meeting of the incorporators there were no meetings of either the stockholders, directors or executive com-

mittee until May, 1913, when Dodson's frauds were discovered, when Messrs. Dangberg and Humphrey took off their hats and held a meeting of the executive committee. [Tr. pp. 108, 113-114.] It seems a fair inference from the fact the present suit was brought by the Dangberg Land & Livestock Company, that when the Arizona and New Mexico projects fell through the corporation had served its purpose.

In conducting their operations Dangberg, Humphrey and Dodson disregarded the ordinary rules of corporate practice. Indeed, this appears from what has already been said, but additional evidence is not far to seek. Thus the articles of incorporation provide:

"There shall be elected by the board of directors at their annual meeting, or at any meeting thereof, a general superintendent and manager of the corporation who shall office [hold] at the pleasure of the board of directors." [Tr. p. 111.]

The articles also provided for an executive committee, but an executive committee was not appointed, nor did the directors appoint a general superintendent. [Tr. p. 111.] On the contrary, Dodson was employed as general manager (how, it does not appear, but apparently by agreement between the three associates), but there was no contract of employment with him. [Tr. p. 76.] The minute book of the company is silent as to Dodson's authority "of any kind or manner authorizing [him] to purchase the Lazy B cattle." [Tr. p. 77.] Moreover, none of the officers of the company drew any salaries, and Dodson

did not draw any salary as manager. [Tr. pp. 111-112.]

At the grand jury investigation Dangberg testified that he was managing director of the corporation [Tr. p. 80], although no such position was created by the by-laws or articles.

In other ways the enterprise was regarded as a joint enterprise for profit, without reference to corporate forms. On February 26, 1913, Dodson wrote Dangberg:

"If James don't want to come in arrange with Frank so we can buy this and less sell down so we will get control of the range." [Tr. p. 78.]

In Dangberg's letter to Dodson, under date February 4, 1913, the following appears:

"While in the city seeing James, we will have other connections, providing James does not come in." [Tr. p. 93.]

On April 3rd Dangberg wrote Dodson:

"Frank went to see the James Boys, and they have taken over a large tract in California, thus making them impossible, and of which we are glad, as we will either bring in better people, or handle it among ourselves, and I am rather in favor of not cutting it up any more than we have at present, thus being better for us all, if we can arrange for the handling of same." [Tr. p. 107.]

In a letter of March 5, 1913, Dangberg wrote:

"We are anxious to not take in a fourth party, as

we believe that we have arranged the financial end of it, providing we can make contracts at that end, so as not to receive any additional assistance." [Tr. p. 101.]

Having his attention called to the above, Dangberg testified:

"Q. Who were the three already in that you mean by that?

A. Humphrey, Dodson and myself.

Q. And you did not want to take in a third party?

A. Yes.

Q. And you were all equal owners in the deal at that time?

A. Supposed to be." [Tr. p. 101.]

On April 21, 1913, Dangberg wrote Dodson:

"Nichols and Litch were up with Frank [Humphrey] yesterday, and put up their thirty thousand, thus making some forty thousand dollars cash on hand; also that Frank is carrying twenty thousand and we are carrying twenty thousand additional for company account, and the other people are ready to dig up an additional twenty thousand, so you see we will have one hundred thousand absolute to make the turn." [Tr. p. 104.]

The methods used in handling several deals bears the same way. Dangberg testified there were two Wilson deals.

"One was the Wilson deal originally before we organized the Highland Cattle Company in 1912. I believe it was the month of November or December.

That was a deal whereby *we were buying* from Wilson a certain number of head of cattle at $25.00 per head; that is where Dodson bought personally from Wilson. On the 20th day of November, 1912, in El Paso, I assumed part of that contract. * * * I did not think I was taking over one-half of the Wilson contract; that was the Robinson contract. I found out afterwards that the Wilson contract was merged into the Robinson contract." [Tr. p. 110.]

Another version of the same transaction given by Humphrey appears at pages 110 and 120 of the transcript. In another deal known as the Kidwell deal, Dodson drew upon the Highland Cattle Company for $20,000.00, signing the draft "J. C. Dodson, buyer." [Tr. p. 123.] Dodson also drew a draft upon Kidwell and Caswell for $9,000.00, payable to himself or order. [Tr. p. 124.] Regarding the $20,000.00 draft, Humphrey testified:

"Mr. Dodson stated that he would have to pay O. C. Wilson $20,000 right away, and I told him to go ahead and draw a draft for $20,000 to Wilson as he had to go somewhere to meet him." [Tr. p. 127.]

On April 22, 1913, Dangberg wrote Dodson: "believe that when Frank gets down there that you will make some more deals." [Tr. p. 105.]

3. The Scope of Dodson's Authority.

On June 13, 1913, Dangberg testified in part as follows before the *habeas corpus* proceedings:

"At the time of this transaction Dodson was manager of the Highland Cattle Company. [Tr. p. 164.]

He was sent down there to conduct the business of this corporation in this region, and that business was to be the business of buying and selling cattle. [Tr. p. 165.] It was understood in deals that he was to advise before he paid and in ordinary expenses he did not need to. [Tr. p. 166.] This proposition of deals that I spoke of. By deals I mean the purchase of cattle and ranches. That was, he presented the deal to the board of directors before the sale was consummated. It was that no one of the directors could do business without the knowledge of the rest of the directors. Mr. Dodson was one of the directors. [Tr. p. 167.]

Q. And that the manager couldn't do business in buying and selling ranches and cattle without the authority of the board of directors?

A. Without a subsequent authorization or knowledge of the board of directors." [Tr. p. 168.]

The following is from Dangberg's testimony before the grand jury in September, 1913:

"I told him (Dodson) that I would take the matter up with the president, Mr. Humphrey, and I thought we could make the deal on that basis and could raise the money and go through with it. After talking it over WE AUTHORIZED HIM TO GO AHEAD AND MAKE THE DEAL on his representations." [Tr. p. 87.]

Before the deal was closed by Dodson, Dangberg and Humphrey went over the range and looked at the cattle. They went to Ducan, Arizona, with a view to seeing Mr. Foster, but gave up the idea because of

an excuse made by Dodson, who told them that Foster was an old man and ill. [Tr. pp. 112-118.] After the discovery of the frauds in May, 1913, Dangberg admitted that Humphrey and himself did not take the matter up directly with Foster because Dodson had commenced the deal and they thought it was better to let him see it through. [Tr. p. 162.]

Turning now to the correspondence regarding the sale of cattle by Dodson. On January 29th Dangberg advised Dodson of the presentation of a draft of $10,000.00 drawn by Dodson on the company, and concluded with the following paragraph:

"Before closing will ask that when you draw any checks or drafts that are to be paid at this end that you wire if amount be large; also follow up with written instructions immediately so as to protect this end, thus to make it impossible for an outsider to slip one over on us." [Tr. p. 98.]

Dangberg wrote Dodson under date of February 1, 1913:

"We will be perfectly satisfied with whatever you may do in the premises, but we kind of feel as though selling old cows would be better than to sell the yearling heifers." [Tr. p. 91.]

On March 24, 1913, Dangberg wrote Dodson:

"We have been wondering whether or not you could close out the Wilson contract on the last two lots as a whole and to our advantage, meaning holding the mills, etc., but of course you have thought of this,

undoubtedly, and we know that you will make your deals to our best advantage." [Tr. pp. 95-96.]

On April 3, 1913, Dangberg wrote Dodson, stating that Humphrey would soon join him on new proposed deal. Apparently for the sale of cattle. The writer then goes on to state that he "will abide by the decision of you and Frank." [Tr. p. 106.]

On April 21, 1913, Dangberg wrote:

"I note that you have a chance to buy two thousand cows, but as Frank expects to leave here by the 7th of next month, and also after talking with him yesterday, am going to advise that you hold the said trades in abeyance, or take twenty days' option with no payments, thus not binding yourself until Frank's arrival." [Tr. p. 103.]

On April 22, 1913, Dangberg wrote (already quoted):

"Believe that when Frank gets down there you will make some more deals." [Tr. p. 105.]

Dodson's act in drawing on company for $20,000.00. and the transaction regarding the check for $9,000.00, and the Wilson and Caswell deals, have already been sufficiently referred to. [See Tr. pp. 97, 110, 121, 123, 124, 127, 129.]

Dodson was resident agent for the Highland Cattle Company in New Mexico, and was also vice-president of the company. [Tr. p. 58.] The articles provided:

"The president shall be the chief executive officer

and head of the company, and in the recess of the board of directors and of the executive committee shall have general control and management of its business and affairs." [Tr. p. 108.]

"The vice-president shall be vested with all the powers and shall perform all of the duties of the president in his absence." [Tr. p. 109.]

The business of the corporation was carried on in New Mexico and Arizona, and Humphrey, the president, resided in Nevada, and was in New Mexico only on one or two occasions.

4. The Lazy B Purchase Was a Long Cherished Plan.

From the time the corporation was organized, in January, 1913, it was the main purpose of all three associates to find a way to "put over" the Lazy B deal. That was the theme of practically every letter passing between them and appearing in the record covering the whole period from January to May, and was the subject of many conferences and several long pilgrimages by Dangberg and Humphrey all the way to New Mexico.

On January 29, 1913, Dangberg wrote to Dodson, "Trust that will be prepared with all finances necessary to put over the Lazy B deal." [Tr. pp. 97-98.]

On February 4, 1913, Dangberg wrote Dodson, "Am truly hopeful that you will have things lined up for the Lazy B by the time Frank and I reach there." [Tr. p. 92.]

On February 9, 1913, Dangberg wrote Dodson, "Everything is all fixed at this end and we will have all finances in shape to handle the contemplated deal." [Tr. p. 99.]

On February 25, 1913, Dangberg wrote Dodson from Los Angeles:

"Hope you can tie up on the B, as it all looks good and no other looks so good to the west of us." [Tr. p. 99.]

On February 28th, 1913, Humphrey wrote Dodson that he would go to Reno and figure on whether they could handle the Lazy B. He proceeded:

"It would be wise to get their land and make a better plant of it for to run cattle and grow them up, and if there is any way we can pull it off we will try and do it." [Tr. p. 114.]

On March 2 Mr. Dangberg wrote Dodson:

"Have just telephoned Frank, in Reno. We are to be in Carson together tomorrow to decide on the Lazy B matter * * * trust you will use your best judgment in the premises. We will either bring in better people or handle it ourselves." [Tr. p. 107.]

On March 5th, 1913, Dangberg again wrote Dodson:

"Was with Frank in Carson yesterday talking over the Lazy B matter, asking you the last possible date you had on making the Lazy B deal; also that I thought it best that I should go down again and be with you and thus to assist you in contracts, etc., as I would have to use these contracts to some extent in securing the necessary loan for this extra deal." [Tr. p. 100.]

On March 24th Dangberg wrote Dodson another letter, in which he said that on account of market conditions they "feel a little anxious as to what you may do on your contracts, * * *. We are both anxious for the Lazy B deal and hope to hear from you before the week ends regarding the same." [Tr. p. 95.]

In Dodson's telegram to Dangberg announcing that he had "closed deal with Lazy B. paid check twenty thousand" he also said "made contract for sale of cows and steers subject to your approval." (This was Kidwell, Caswell and Metzer contract.) [Tr. p. 109.]

Dangberg and Humphrey both testified that in their talks with Dodson at Duncan, Arizona, on February 15, 1913, and at Santa Fe, New Mexico, on March 13, 1913, Dodson told them

"He could buy the Lazy B cattle at $27.00 per head, and all the lands and calves from October, all suckling calves thrown in in the bargain." [Tr. p. 112; see, also, Tr. pp. 76, 77.]

5. Conduct of Dangberg and Humphrey on Discovery of Dodson's Frauds.

Between the time of the discovery of the fraud, in May, 1913, and the filing of the present suit, in January, 1914, neither Dangberg or Humphrey ever questioned Dodson's authority. [Tr. p. 143.] On May 23, 1913, the day on which Dodson's fraud was discovered, Dangberg told Foster that Dodson had never made a contract that was what he represented it to be. [Tr. p. 142; see, also, 158-159.] The next day, at

Lordsburg, Foster prevented Dangberg and Humphrey from shipping some of the Lazy B cattle which they had loaded on the cars, stating that they would have to put up their money in the bank at Duncan before they could ship any of the cattle. The cattle were thereupon unloaded and turned loose. [Tr. 143.]

In June, 1913, Dangberg met Day and Foster at Duncan, Arizona. [Tr. pp. 143-144.] Dangberg asked Day to release him from the contract. [Tr. p. 162.] Dangberg admitted that he had looked over the ranges and cattle prior to the making of the contract. Day asked him why he had not talked to Foster, and he replied, as already pointed out, that Dodson had commenced the trade and he thought he had better let him finish it. [Tr. pp. 162-163.] Later on in the same month Dangberg talked to Mr. Day about going on with the contract provided he could borrow $100,000.00 from Day at six per cent. [Tr. p. 163.] In one of the conversations Day told Dangberg that the bogus contract and the altered receipt were fraudulent on their face, because 9,000 head of cattle were worth more than the purchase price reserved, and it would let the other property go for nothing. Dangberg kind of laughed and said "we did think we had a good deal." [Tr. pp. 143, 144, 162, 163.]

6. Attempts at Concealment, Inconsistencies and Improbabilities in the Testimony of Dangberg and Humphrey.

The attempts at concealment of material facts, and the inconsistencies and improbabilities in the testimony of Dangberg and Humphrey are best appreciated

by a perusal of their testimony, but we will give a few of the most glaring instances.

Early in his cross-examination Dangberg was asked whether the Highland Cattle Company was endeavoring to get control of a large section of the range. He replied, "Well, not particularly, no. They had all of these few bunches of cattle and they were just trading around in the country, as far as I could see." [Tr. p. 119.]

Before being impeached by the testimony before the grand jury Dangberg stated that Dodson was not general manager of the company. [Tr. p. 79.] When first asked whether Dodson had been authorized to go on with the deal as it had been explained to Dangberg and Humphrey in Arizona and New Mexico in February and March, 1913, Dangberg replied:

"We authorized him to go ahead and get an option." [Tr. p. 88.]

Dangberg further testified that they left no matters to the discretion of Dodson,—that everything had to be submitted to himself and Humphrey. [Tr. p. 90.]

Humphrey testified that he did not consider Dangberg and himself on equal terms with Dodson, and he considered that Dodson was "just working on these trades down there and corresponding with us" [Tr. pp. 115-116]; that Dodson informed him that the Lazy B people were going to throw in all their land for nothing [Tr. 117]; that he did not know that Day and Foster had a thousand acres of cultivated land alone worth about $50,000.00 [Tr. 117]; that Dodson pointed out the two or three mills belonging to Day and Fos-

ter, but he did not consider the range of any particular value at that time. That "we didn't know anything about it. We were buying cattle." [Tr. 118.]

Mr. Foster testified:

"They asked me if the receipt was like it was when I signed it. I told them no, and said this 9,000 head was written in there, because we didn't guarantee any number, and I says, 'You can see this is in a different ink,' and Mr. Dangberg says, 'It is fading.'" [Tr. pp. 145-146.]

It is also in order to point out that the reasonable market value of the range property of Day and Foster on or about the 23rd day of March, 1913, was $50,000.00, and that on that day in Arizona the market price of range cattle was $30.00 a head and of calves $50.00 a head [Tr. pp. 133, 153, 154]; so that 9,000 head of cattle alone were worth more than the purchase price carried in the contract.

BRIEF OF ARGUMENT.

I.

Dodson Had Authority to Enter Into the Contract and Secret Limitations or Private Instructions Were Not Binding on Day and Foster.

It is too clear to require elaboration that Messrs. Dangberg, Humphrey and Dodson, operating as the Highland Cattle Company, were engaged in buying lands and cattle in Arizona and New Mexico, and endeavoring to get control of the range; and that the contract in question was in furtherance of these pur-

poses. It was, therefore, within the scope of the authority of Dodson as general manager of the company. Moreover, it appears from the evidence that he was expressly authorized to enter into the contract. It may be conceded for present purposes that Dangberg and Humphrey understood that the contract was to carry 9,000 head of cattle rather than approximately 7,000. This raises the question whether private instructions to Dodson or secret limitations on his authority would avoid the contract.

The point here involved has been passed upon by the United States Supreme Court, as well as by the Supreme Court of Arizona, the state in which the contract was made. Both courts have accepted and applied the familiar principle that "the authority of an agent in any given case is an attribute of the character bestowed upon him in that case by the principal" (Mechem on Agency, 2nd Ed., sec. 709); and third persons are concerned with the apparent authority of the agent, and not bound by secret instructions or limitations inconsistent therewith.

The case of Northern Railway Company v. O'Connor, 232 U. S. 508, arose on an action against the railway company for the value of goods shipped. The Boyd Transfer Company of Minneapolis acted as a forwarder by railroad by collecting from different shippers small loads of goods sufficient in the aggregate to fill a car. At the time of the shipment referred to in the case, the railway company had four rates on household goods. While these tariffs were in force the Boyd Transfer Company was employed by the

plaintiff, on terms not stated, to box, transfer and ship certain property which she desired to have sent to Portland, Oregon. The Boyd Company shipped the goods as "emigrant movables," "released to $10 per cwt.," and naming "Boyd Transfer and Storage Company, shipper." The goods were lost in transit. The plaintiff testified that the Boyd Company, in soliciting the shipment, had stated that it had a through car, but said nothing about shipping her effects as household goods, and she understood that they were to be shipped as a separate consignment; also that she had stated to the transfer company that her goods were new, and that as she had no insurance she was willing to pay the regular rates. A judgment for plaintiff was reversed by the Supreme Court. The portion of the opinion dealing with the question of private instructions and secret limitations on the authority of an agent is as follows:

> "The plaintiff contended, however, that she had expected her goods to be transported as a separate consignment. But the transfer company had been entrusted with goods to be shipped by railway, and, *nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her private instructions or limitation on the authority of the transfer company,* whether it be treated as agent or forwarder. If there was any undervaluation, wrongful classification, or violation of her instructions, resulting in damage, the plaintiff has her remedy against that company." (Pages 514, 515.)

In Insurance Company v. Wilkinson, 13 Wall. 222, it was held that the insurance company was bound, by an application filled out by its solicitor, and deviating from the printed form, although the solicitor's actual authority was only to receive and transmit applications and premiums. Mr. Justice Miller, who wrote the opinion, said:

> "The powers of the agent are, *prima facie,* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." (Page 235.)

To the same effect is

Insurance Company v. McCain, 96 U. S. 84.

In El Paso Livestock Commission Co. v. Colorado Livestock Commission Co., 171 Fed. 20, 96 C. C. A. 262 (8th Circuit), it was said:

> " 'That, where one holds another out to the world as his agent, in determining the liability of the principal the question is not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified, from the acts of the principal, in believing was given to him.' " (Citing numerous cases.)
>
> 171 Fed. 24.

In Lamon *et al.* v. Speer Hardware Co., 198 Fed. 453, 119 C. C. A. 1 (8th Circuit), it was held that authority to sell a cotton gin plant and appurtenant machinery carried with it apparent authority on the part of the agent to agree in order to make the sale to set up the plant and machinery and put it in running order. Sanborn, J., said in part:

"A principal is as conclusively bound to innocent third parties by the act of his agent in the exercise of the apparent authority within the scope of his agency with which his master clothes him as he is by the actual authority conferred upon him." (Citing cases.)

198 Fed. 457-458.

In Swift & Co. v. Detroit Rock Salt Company, 233 Fed. 231 (C. C. A. 6 Cir.), the court said:

"Rude was the agent of defendant and was given charge of its office and correspondence for the express purpose of selling its salt. The rule is settled that, in the absence of notice otherwise, 'parties dealing with an agent have a right to presume that his agency is general, and not limited * * * and the presumption is that one known to be an agent is acting within the scope of his authority,' and also 'that the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, rather than the instructions given.'" (Citing cases.)

233 Fed. 234.

In California Development Company v. Yuma Valley etc. Co., 9 Ariz. 366, 84 Pac. 88, the Development Company was represented at Yuma by an agent. The agent, under instructions from the vice-president and general superintendent, leased a dredge, disregarding the instruction not to lease unless it was insured. The instruction last referred to was held not binding upon the lessor.

In Leavens v. Pinkham *et al.*, 164 Cal. 242, a principal, whose business consisted in large part of buying fruit, put an agent in charge of his business in a certain locality as manager thereof. A third person dealing with the agent in good faith was held not bound by a secret limitation as to price. The court said in part:

> "It will not be questioned, we assume, that where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, as we must assume under the evidence it did in this case, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitation on his authority, are entitled to rely on such appearances."
>
> 164 Cal. 248.

Another instructive case is Crews v. Ganeau, 14 Mo. App. 505.

A corollary to the proposition that a third person is not bound by secret limitations upon the authority of the agent is found in the rule that third persons are not obliged to inquire into and ascertain the authority of corporate agents.

In Louisville etc. R. Co. v. Louisville Trust Co., 174 U. S. 552, the court said:

> "In Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."
>
> 174 U. S. 573-574.

See also:

Swift v. Detroit Rock Salt Company, 233 Fed. 231, 234-235;

Mechem on Agency, 2nd Ed., Sec. 762.

At page 31 of our adversaries' brief the following occurs:

"In the case of Starbird v. Curtiss, 43 Me. 352, it was held that an agent authorized to purchase a one-sixteenth part of a ship at $40.00 a ton did not bind his principal by purchasing the same at $44.00 per ton.

"Likewise in Day v. Snyder, 130 S. W. 716, it was held that where terms and conditions of the purchase

are limited by the principal, the agent has no authority to purchase differently."

The cases cited differ widely from the case at bar on their facts, and neither of them discusses the doctrine of apparent authority or limitations upon the same, and said cases are in no way in point here.

In Starbird v. Curtiss, *supra,* the action was in *assumpsit* on a money count for the recovery of a part payment made upon the purchase price of an interest in a ship that was being constructed. The plaintiff was informed by one Potter that the ship was being constructed at $40.00 per ton, and that Potter had agreed to take one-sixteenth at that price. The plaintiff agreed with Potter that he would take another sixteenth at the same price per ton, and paid $600.00 which came into the hands of defendants by the hands of said Potter, and for which they gave their receipt on account of the ship. There is nothing in the report to suggest that Potter knew the real facts. The case went to the upper court on the instructions, and both the instructions and the opinion of the reviewing court are silent on the questions here under discussion. The gist of the matter is that Potter, as well as the plaintiff, were under a misapprehension as to the terms of the contract, and Potter was not an agent in charge of the plaintiff's business.

In Day v. Snyder Brokerage & Storage Company, *supra,* the defendants in Texas wrote a broker in New York to purchase for them certain goods, among others walnuts, and specified that the walnuts should be "new

walnuts." The action was to recover for the price of *old walnuts* purchased by the broker from the plaintiff. Apparently the defendant had no business in New York,—at least the broker was not in charge of any business for him. As already suggested, there is no discussion in the opinion of the questions before this court, and the only authority cited in the case deals with the question of purchase by sample.

Plaintiff in error devotes several pages of its brief (pages 27-31) to the contention that a third person dealing with an agent is at his peril required to ascertain the agent's authority. It takes only a moment's reflection to see that if this contention were accepted in all its rigor there would be no place for the doctrine of apparent authority. This is clearly pointed out in Corpus Juris; Title, Agency (a work many times referred to by plaintiff in error, and cited in this connection).

> "*Qualification of General Rule.* Where the third person has ascertained the general character or scope of the agency, he is authorized to rely upon the agent having such powers as naturally and properly belong to such character, and, in the absence of circumstances putting him upon inquiry, is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent."
>
> 2 C. J., pp. 564-565.

The cases cited at the pages in the brief just given do not deny the qualification thus stated.

Lauer Brewing Co. v. Schmidt, 24 Pa. Superior Court 396, only holds that the general collector of a

Brewing Company, who was in effect engaged in the business of opening new accounts and settling accounts with customers, had no authority to make a contract with customers by which the latter were to receive compensation for services, and to be relieved from liability for accounts not collected.

In Bank of Commerce v. Baird Mining Co., 13 N. M. 424, 429, 85 Pac. 970, it was held that the general manager of a mining company did not have authority to draw drafts upon his principal, the drafts being for his own use and not in connection with firm business, such as the purchase here of land and cattle by Dodson. The case dealt with the question of ostensible rather than apparent authority. The inquiry was whether there had been a sufficient course of dealings to establish ostensible authority.

In Franklin v. Havalena Mining Co., 16 Ariz. 200-208, 141 Pac. 727, it was held that officers of a corporation as such have no authority to lease or sell company property.

In Brutinel v. Nygren, 154 Pac. 1042 (Ariz.), it was held that when one was constituted an agent to find a purchaser of a drug business and not to effect the sale thereof, he had no authority to agree to pay a commission on the sale.

It is urged by plaintiff in error that Dodson did not have authority to execute the contract by reason of his being general manager. The vice of the argu-

ment consists in the assumption that the corporation was "engaged in the business of buying and selling cattle, and owning about 3,000 head of cattle." (Page 22.) As pointed out in "the statement of the case" prefixed to this brief, the company was engaged in the enterprise of buying land and cattle with a view of getting control of the range. It did not merely own and operate a small ranch; it was essentially a trading company.

The cases cited by counsel in this connection are all distinguishable.

In Blen v. The Bear River etc. Co., 20 Cal. 602, the business of the corporation consisted in conveying water through ditches, and it was held that the president of the corporation had no authority to contract for a new ditch. The corporation in that case was not buying and selling ditches or undertaking to get control of the water business of the district.

In Manhattan Liquor Company v. Magnus, 43 Tex. Civ. App. 463, 94 S. W. 1117, the purpose of the corporation was the operation of a single saloon, and it was held that the managing agent had no authority to purchase another saloon.

Trephagen v. South Omaha, 69 Neb. 577, 96 N. W. 248, is wide of the mark, as appears from counsel's own statement of the case. There the corporation was engaged in the business of caring for livestock consigned for sale, and the general manager was held without authority to sign a petition for paving a city street.

In Bond v. Pontiac etc. R. Co., 62 Mich. 643, 29 N. W. 482, the railroad company, having delegated the construction of its depots to an investment company, it was held that the chief engineer of the railroad company had no authority to contract for the construction of such depots.

In Hurley v. Watson, 68 Mich. 531, 36 N. W. 726, it was held that the chief clerk and bookkeeper of a coal company had no implied or apparent authority to offset debts due the firm from a customer against obligations of his own due to such customer.

In Gregory v. Loose, 19 Wash. 599, 54 Pac. 33, it was held that an agent employed as manager of a shingle mill, with authority to contract for and estimate shingle bolts subject to the approval of his principal, had no implied authority to contract for the construction of a logging road to timber purchased by his principal.

II.

The Highland Cattle Company Was a Mere Alter Ego of Dangberg, Humphrey and Dodson; and Dodson as Partner or Co-Adventurer Had Authority to Enter Into the Contract and Draw the Draft.

The fact that the Highland Cattle Company was a corporation presents a false quantity in this case. The acts of the three associates were entirely uninfluenced by the circumstance of incorporation. Their adventure for profit was carried on precisely as though no

corporation stood between themselves and the outside world. Had they merely adopted the name and style of the Highland Cattle Company without incorporation, they could not have carried on their business differently.

Two late cases in this court make unnecessary an extended discussion of the principle that courts will look through the corporate form to the substance and reality of things when justice demands.

Norma Mining Co. v. Mackay, 241 Fed. 640;
Linn etc. Co. v. U. S., 196 Fed. 593, 116 C. C. A. 267.

It is settled by the authorities that this principle is operative in courts of law as well as in courts of equity.

Sargeant v. Palace Cafe Co., 54 Cal. Dec. 161 (Aug. 16, 1917);
Higgins v. California Petroleum Co., 147 Cal. 363;
Ford v. Chicago Milk Shippers Association, 155 Ill. 166, 39 N. E. 651;
Home Fire Insurance Co. v. Barber, 67 Neb. 644, 108 Am. St. 716;
State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279;
Richardson v. Buhl, 77 Mich. 632.

Moreover, the business as carried on by Messrs. Dangberg, Humphrey and Dodson was not corporate business, because the acts of the associates were done without going through any of the forms prescribed by law.

The scheme of corporate organization and management prescribed by law is exclusive.

Taylor v. Griswold, 13 N. J. Law 222, 27 Am. Dec. 33;

State v. Anderson, 31 Ind. App. 34, 67 N. E. 207;

Durkee v. People, 155 Ill. 354, 46 Am. St. 340.

In the present case, therefore, the acts of Dodson were acts of the three associates and not of the corporation.

Shorb v. Beaudry, 56 Cal. 446, is an instructive case on the present point, because in that case the matter of looking through the corporate form was not complicated by any question of fraud or attempt at circumvention of positive law. It was held in that case that parties who formed a corporation for the purpose of acquiring lands and water rights and of developing the same, had by the conduct of their affairs constituted themselves a partnership. The court said in part:

> "That the corporation was formed as a mere agency for more conveniently carrying out the agreements between Temple, Beaudry and Wilson, is sufficiently apparent. As a corporation, it paid nothing, incurred no liability, and was not to receive any part of the proceeds of the sales of land, except for the purpose of developing and improving the property held by it. All the profits were to be distributed among the three members of the association, in the proportion fixed by their contract. No certificates of stock were ever issued by the corporation, nor

was it contemplated that any ever should be. * * *"

56 Cal. 450.

In the recent case of Sargent v. Palace Cafe Co., 54 Cal. Dec. 161, the action was against the corporation on a promissory note. At the time the note was executed Sargent was the owner of all the shares of stock except two qualifying shares. The consideration for the note was the transfer by Sargent of his stock to one of the qualifying stockholders. Both persons were directors of the corporation. The action was defended on the ground that the note was void because the directors dealt with property or credit of the corporation to their own advantage. A judgment for plaintiff was affirmed, the court saying in part:

> "The purchaser and seller of the business preferred to act through the corporation; no one was deceived; the bargain was partly consummated even to three payments of interest on the note here in litigation; and we find no proper excuse in the record for the attempt to interpose technical defenses to the payment of the note executed as a part of the purchase price." (Page 162.)

Other instructive cases in this connection are Miller & Lux v. Eastside Canal Co., 211 U. S. 293, in which it was held that a corporation organized in Nevada for the purpose of enabling the incorporators to litigate in the Federal courts in California, was not entitled to sue in such courts; and United States v. Lehigh Valley Railroad Company, 220 U. S. 257, in which it was held that the Hepburn Act was infringed by a

railroad carrier, which by the exercise of its power as a stockholder in a manufacturing, mining and producing corporation deprived the latter of independent existence and made it virtually an agency or dependency or department of the carrier.

It is submitted that the Highland Cattle Company was a mere creature of Messrs. Dangberg, Humphrey and Dodson, and by reason of that fact and their conduct in themselves disregarding the corporate entity, they were in effect partners, with the result that private limitations upon the authority of Dodson were not binding upon Day and Foster.

Kimbro v. Bullitt *et al.*, 22 How. 256, 266-267;
Winship v. Bank of U. S., 5 Peters 529.

III.

"When a Question Arises Between Two Innocent Parties, Which of Them Shall Suffer by the Misconduct of Another, the Loss Must Fall Upon Him Who Has Enabled the Wrong to Be Committed and Not on Him Who Had No Means of Knowing That It Was a Wrong."

Calais Steamboat Co. v. Scudder, Admr., 2 Black 372.

One of the main applications of the principle above stated has been to the law of agency. In the case cited:

> "a person residing in California, employed an agent to contract for, and superintend the building of a ship at New York. The agent was furnished with funds for the purpose, and specially

directed by the principal to give himself out as the true owner, and to conceal the interest of the principal. Accordingly the agent made all contracts in his own name, and had the vessel registered as his own property. After she was finished he sold her, and put the price in his pocket: *Held,* that the principal's right in the vessel was gone, unless he could prove that the vendee had notice of his right before payment of the purchase money." (Syllabus.)

The authorities on this subject are legion. The California cases contain clear expositions of the controlling principles, and show that if Dodson defrauded his principal the loss must rest where it has fallen, especially as Day and Foster got legal title to the money paid.

Schultz v. McLean, 93 Cal. 329;

Shirey v. All Night & Day Bank, 166 Cal. 50;

Fowles v. National Bank of California, 167 Cal. 653;

Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., *et al.,* 53 Cal. Dec. 137 (Jan. 29, 1917).

See also:

Whittle v. Vanderbilt etc. Co., 83 Fed. 48, 55-56 (C. C. S. D. Cal.)

California, C. C. 3543.

IV.

The Court Was Justified in Drawing the Inference That There Were No Secret Limitations Upon the Authority of Dodson, (a) Because Dangberg and Humphrey Attempted to Conceal the True Facts and Give False Testimony, and (b) Because of the Long Cherished Purpose and Plan to Make the Lazy B Deal, and the Acts and Declarations of His Associates Concerning It.

The facts regarding the actual agency of Dodson and the scope of his actual authority were peculiarly and exclusively within the knowledge of Dangberg and Humphrey, except insofar as some of them came to defendant by chance. It is, of course, somewhat uncertain what the testimony might have been had the defendants been so unfortunate as not to have had some of the correspondence that passed between Dangberg and Humphrey on the one hand and Dodson on the other, and to have had a transcript of *habeas corpus* and grand jury proceedings in New Mexico. But it is significant that the complaint alleged Dodson's only authority was to hire ranch help and pay for the same and inquire regarding deals and report the results of his inquiries to Dangberg; and it is worthy of note that the plaintiff produced only one letter sent by Dodson, the other letters in evidence being those of Dangberg and Humphrey. The transcript of the evidence is also illuminating on this subject. Sufficient instances have been given in the foregoing "statement of the case" to show that both Dangberg and Humphrey tried

to conceal the true facts regarding Dodson's authority, and in the endeavor so to do became involved in a maze of contradictions and falsehoods.

Lord Mansfield laid it down as a maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." (Blatch v. Archer, 1 Cowp. 63, 65.) This maxim has been codified in California in the Code of Civil Procedure, section 2061, subdivision 6.

The court below was not obliged to believe the testimony of Humphrey and Dangberg regarding secret limitations, and instructions.

In Blankman v. Vallejo, 15 Cal. 638, 645, the court said:

> "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief."
>
> (15 Cal. 645.)

Our Code of Civil Procedure, Sec. 1963, gives as a presumption:

> "5. That evidence wilfully suppressed would be adverse if produced."

In Jones on Evidence (2nd Ed.), section 18, it is said:

"Such act may throw suspicion on all other evidence produced by [the destroyer of documents]."

In Del Campo v. Camarillo, 154 Cal. 647, 666, it was said:

"Evidence withheld is presumed to be adverse."

In Parsons v. Weis, 144 Cal. 410, the court said:

"The respondent herself endeavored to get before the trial court the want of any reasonable or plausible pretense for the said averments in the complaint in the former action, but appellant frustrated her efforts, in that respect, while offering nothing himself on the subject. * * * It appears, therefore, that the respondent proved that said averments were, in fact, false; that she made reasonable efforts to show that appellant had no plausible grounds for said false averments, to which efforts appellant objected; and that appellant, having the ability to show whether or not the averments were wilfully false, simply stood mute. Considering these things, the court was warranted in finding that the false averments were wilfully false."

144 Cal. 420-421.

In connection with the testimony of Dangberg and Humphrey to the effect that there was a secret limitation regarding nine thousand head of cattle. consider the fact that nine thousand head of cattle alone had a market price in excess of the entire purchase price provided in the contract. Martin, a duly qualified witness, placed the value of the cattle at $32.00 a head [Tr. p. 154]. In one of Dangberg's letters Dodson is

told that he will make "31 or 33 for yearlings" [Tr. p. 99]. In the Kidwell contract, made the day prior to the making of the Lazy B deal, and which was to be filled with the Lazy B cattle, the prices were $28.00 for yearling steers and $40.00 for two, three and four-year-old steers, and up [Tr. pp. 121-122]. If even $30.00 a head on the average were taken as a basis, the market value of nine thousand head of cattle would have been $270,000.00; yet the contract price was only $250,000.00, and the contract carried, in addition to the cattle, ninety horses, a thousand acres of cultivated land, three hundred of which were under ditch, all the ranch equipment, and control of a range twenty miles square, by virtue of the ownership of wells protected by deeded land. Moreover, the interpolation in the receipt regarding nine thousand head of cattle was in different colored ink from the body of the receipt; and when Dangberg was confronted with this, the only explanation he could vouchsafe was, "It is fading" [Tr. pp. 145-146].

And it may again be suggested that the plaintiff failed to produce any of Dodson's letters, except one, and staked their entire proof regarding his authority, as well as the pretended limitations upon the same, on the testimony of Humphrey and Dangberg, both of whom were thoroughly discredited witnesses.

The main problem in "putting over the Lazy B deal" was how to finance it; and all the associates agreed upon the plan of "selling down close"; and in carrying out this approved plan Dodson did not close the Lazy B deal until he had made a contract to sell part of the Lazy B cattle to Kidwell, Caswell and

Metzer. [Tr. p. 121.] Nor did Dangberg and Humphrey attempt to repudiate the contract with Day & Foster until release of said Kidwell contract had been effected [Tr. pp. 141-142].

It is submitted that the above facts and circumstances clearly justified the court below in drawing the inference that there were no secret limitations upon the authority of Dodson.

V.

There Was No Error in Excluding Testimony of a Conversation Between Dodson and Dangberg and Humphrey After the Execution of the Contract.

Plaintiff in error has specified the exclusion of such evidence as error (its brief, p. 9).

The only purpose for which such evidence could have been relevant was to negative ratification. Plaintiff in error seems to concede this, and the authorities cited by him deal only with declarations of the agent on the issue of ratification. (Its brief, pp. 14-15.) The testimony, therefore, was not relevant in plaintiff's case in chief, and it did not later become relevant because no attempt was made by defendant to prove ratification. No issue was presented as to ratification and there is no finding on that subject.

Moreover, if there was any error it was corrected. The court itself asked both Dangberg and Humphrey whether they believed the bogus contract was the true contract at the time they honored the draft, and they both testified in the affirmative. [Tr. pp. 128-131.]

Anything that Dodson might have said was, in any view of the case, relevant only upon the question of the belief of Dangberg and Humphrey.

It is, of course, obvious that declarations of an agent are not competent evidence of his authority.

Attleboro Mfg. Co. v. Frankfort etc. Ins. Co., 240 Fed. 573, 581-582 (C. C. A. 1st Cir.).

From the foregoing it appears that not only is there substantial evidence in the record in support of the findings, but the evidence is overwhelmingly in their favor, and what little evidence there is to the contrary does not rise to the dignity of proof.

It is respectfully submitted that the judgment of the court below should be affirmed with costs to defendant in error Day.

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No. 3005.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

H. F. Dangberg Land & Live-stock Company,

Plaintiff in Error,

vs.

H. C. Day and S. A. Foster, Co-Partners, Doing Business Under the Firm Name and Style of Day & Foster,

Defendants in Error.

Supplemental Brief for Defendant in Error Day.

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Supplemental Brief for Defendant in Error Day.

The purpose of this supplemental brief is to make a point overlooked in our main brief. The point is, that the action being one at law and having been tried before the court without a jury (a jury having been expressly waived by stipulation filed with the clerk), and there being special findings of fact, the plaintiff in error is in no position to raise the question of the sufficiency of the evidence to support the findings or the judgment, because at the close of the evidence

there was no request by him "for a ruling thereon, or for a motion for judgment, or for some motion to present to the court the issue of law so involved." (Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 127 C. C. A. 332, 9th Cir.) In the case cited the finding was a general one.

The rule that the court will not inquire into the sufficiency of the evidence to support the findings or judgment, unless that action was presented as a matter of law in the court below, results from sections 649, 700 and 1011 of the Revised Statutes, and the rule is the same whether the findings were general or special. In the following cases the findings were special and it was held that the plaintiff in error, not having made a peremptory request or motion before the close of the evidence, was precluded from raising the sufficiency of the evidence in the reviewing court.

Mercantile Trust Co. v. Wood, 60 Fed. 346, 348, C. C. A., 8th Cir.;

Citizens Bank v. Farwell, 63 Fed. 117, C. C. A., 8th Cir.

An excellent statement of the rule will be found in the recent case of Wear v. Imperial Window Glass Co., 224 Fed. 60 (C. C. A., 8th Cir.), where the court said in part:

> "But the case was tried by the court below without a jury, and its decision of that issue is not reviewable in this court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial

It is respectfully submitted, therefore, that the question of the sufficiency of the evidence to support the findings is not open for review in this court; and as the alleged error regarding the admissibility of evidence is not well taken, the judgment should be affirmed.

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that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party. No such request was made in this case, and the specifications of error, therefore, present no question reviewable by this court. When an action at law is tried without a jury by a federal court, and it makes a *general finding, or a special finding of facts,* the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, "for any error of fact" (Revised Statutes, Sec. 1011 [U. S. Comp. Stat. 1913, Sec. 1672, p. 700]), and a finding of fact contrary to the weight of the evidence is an error of fact.

The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial. United States Fidelity & Guaranty Co. v. Board of Com'rs., 145 Fed. 144, 150, 151, 76 C. C. A. 114, 120, 121, and cases there cited; Mercantile Trust Co. v. Wood, 60 Fed. 346, 348, 349, 8 C. C. A. 658, 660, 661; Barnard v. Randle, 110 Fed. 906, 909, 49 C. C. A. 177, 180; Barnsdall v. Waltemeyer, 142 Fed. 415, 417, 73 C. C. A. 515, 517; Bell v. Union Pacific R. Co., 194 Fed. 366, 368, 114 C. C. A. 326, 328; Seep v. Ferris-Haggarty Copper Min. Co., 201 Fed. 893, 894, 895, 896, 120 C. C. A. 191, 192, 193, 194; Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 784, 127 C. C. A. 332, 334."

224 Fed. 62, 63.

See also, Maryland Cas. Co. v. Cincinnati &c.
240 Fed 364 (C.C.A. 9th Cir.)

No. 3007.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,

Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,

Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

Opening Brief for Western Union Telegraph Company, Plaintiff in Error

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THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant in Error.

OPENING BRIEF FOR WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR.

The record presents two writs of error directed to the United States District Court for the Northern District of California, to review a judgment in favor of

plaintiffs and against defendant below, for the sum of $11,250 in damages for delay in the delivery of a telegram. Plaintiff in Error, the defendant below, complains of such judgment. The plaintiffs below complain because the judgment did not allow interest. By stipulation of all parties, the entire record in both cases is presented in one transcript. As each party is Plaintiff in Error in one instance and Defendant in Error in the other, we beg leave, in order to avoid confusion of terms, to refer to them in this brief by their proper names or as plaintiffs and defendant, respectively, in the court below.

STATEMENT OF THE CASE.

The case was tried chiefly upon the admissions in pleadings and an Agreed Statement of Facts; but there was some testimony offered. The case was tried before the Court without a jury, a jury having been waived (Tr., 164). The telegram was sent by plaintiffs Lange and Hastings, from Oakland, California, to Lyon County Bank, at Yerington, Nevada, for the purpose of intercepting the payment of a draft previously mailed by them to said bank for $11,250, to meet a payment which was to become due under a contract made by said Lange and Hastings with W. C. Pitt and W. T. Campbell, wherein the latter agreed to sell and the plaintiffs agreed to buy certain shares of mining stocks and provided for the payment at in-

tervals to said bank which held the contract in escrow. The essential facts of the case are these:

On March 16, 1907, plaintiffs Lange & Hastings entered into a written agreement with W. C. Pitt and W. T. Campbell, set out in the record at pages 75 to 77. By this contract the first parties, Pitt and Campbell, agreed to sell, and the second parties, Lange and Hastings, agreed "to buy, take and receive from said parties of the first part" certain shares of mining stock upon the following terms and conditions in substance:

1st. The total price or sum to be paid was seventy-five thousand dollars, of which seven thousand five hundred was to be paid on the execution of the agreement, and the remainder in installments of eleven thousand two hundred and fifty dollars each at intervals of two months thereafter, beginning May 1, 1917.

2nd. The shares of stock were to be deposited in escrow in the said Lyon County Bank, properly endorsed, to be delivered to Lange & Hastings upon final payment therefor, and by such contract "the Lyon County Bank is hereby constituted the agent of the sellers for the purpose of receiving all payments and giving acquittances."

3rd. "And it is further agreed that in the event of " default by said parties of the second part in making " any of the payments herein provided for, said Lyon " County Bank shall be authorized under the terms of

"such deposit in escrow, and it is hereby authorized, "to deliver all of the shares of stock so deposited with "it pursuant hereto to said parties of the first part, and "that all payments theretofore made by said parties of "the second part shall be forfeited to said parties of the "first part, and that thereupon all rights of each of the "said parties hereunder shall forever cease and de-"termine" (Tr., 77).

The complaint in the action did not set up a copy of the contract and did not allege that Lange and Hastings had agreed to "buy, take and receive" said shares of stock and pay for the same, but alleged only that Pitt and Campbell had agreed to sell the stock (Tr., 5). Neither did the complaint allege that in the event of default of payment, the Bank was authorized to return the stock and the payments therefore made should be forfeited and "that thereupon" all rights of each of the said parties should cease and determine but, on the contrary, alleged that "upon such *default*" all rights of each of the parties should cease and determine (Tr., 6).

The stock was deposited in escrow pursuant to said agreement, and the cash payment made at the time of its execution. The next payment of $11,250 was due on or before May 1, 1907. On April 27th, plaintiffs purchased a bank draft for that amount and forwarded it by registered letter, from Oakland, California, to the Lyon County Bank, at Yerington, Nevada. In

ordinary course of the mail this draft should have arrived and been delivered to the bank on the evening of April 29th or on the morning of April 30th. It was in fact received by the bank between the hours of 8:30 and 9:00 o'clock A. M. on the latter date. With the draft, was a letter of instructions from plaintiffs to the bank stating that the draft was to apply on the payment due under the escrow of Messrs. Pitt and Campbell. After mailing the draft the plaintiffs claimed to have received information to the effect that the stock of the mining company was of little value and determined to make no further payments. Accordingly, at 8:50 o'clock on the *evening* of April 29th, they filed with the defendant Western Union Telegraph Co. at its office in Oakland, California, the message in suit reading:

"Oakland, April 29th, 1917.

"Lyon County Bank,
Yerington, Nevada,

"Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

HASTINGS AND LANGE."

Plaintiffs at the time, explained to the defendant's agent the purpose of the message, stating that they had mailed a draft for $11,250 to the Lyon County Bank on April 27th to meet a payment due on a contract for the purchase of shares of mining stock by them from Pitt and Campbell and desired to have the mes-

sage delivered "before banking hours on the morning of April 30th," for the purpose of intercepting the payment of the draft, and that unless the message was delivered to the bank before that time, the money would be paid to Pitt and Campbell and the amount of the draft would be lost to them. The telegraph message was in typewriting, prepared by plaintiffs in their own office in Oakland, prior to going to the telegraph office and written on one of the regular blanks of the telegraph company, which is set out in Finding XI (Tr., 53-54). The full message containing all the stipulations and agreements in reference thereto is found in plaintiffs' Exhibit 3 (Tr., 83-5). The pertinent parts of the message contract are that the message is sent

> "subject to the terms on the back hereof, which are hereby agreed to."

The agreement referred to classified messages according to the liability which is to be assumed by the company for mistakes and delays in the transmission or delivery thereof, and provides for a different rate for each class of message. The rate is proportioned to the liability. The contract provides in effect that the message, at the parties' own option, may be sent at the risk of the sender, or at the risk of the company.

> *Primrose* v. *Western Union Tel. Co.*, 154 U. S., 1.

These classifications are "unrepeated messages," "repeated messages" and "insured messages."

First. The smallest rate is charged for an unrepeated message, for which it is agreed the company shall not be liable for mistakes or delays in the transmission or delivery thereof, beyond the amount received for sending the same.

Second. Repeated messages, that is messages which are telegraphed back to the originating office for comparison, are sent for one and one-half times the rate charged for an unrepeated message, and for which it is agreed the company shall not be liable beyond fifty times the sum received for sending the same, *unless specially insured.*

Third. In addition to the toll upon a repeated message, correctness in transmission can be *insured by a contract in writing* for one per cent. of the amount agreed upon.

The message contract further provides that

> "This company is hereby made the agent of the sender *without liability* to forward any message over the lines of any other company when *necessary to reach its destination.*"

The regular course of transmission of telegrams from Oakland, California, to Yerington, Nevada, at that time was by way of Reno to Wabuska, in the State of Nevada, "which was the *terminus* of the Western "Union Telegraph Company's lines for Yerington

"messages, and thence by telephone over the line of the "Yerington Electric Company to Yerington" (Agreed Statement, Tr., 67). Each company had its office at Wabuska in the office of the Southern Pacific Railroad Company, and each made its own arrangements with the railroad company to handle its business at that point. Each company charged its own separate tolls. It is agreed that "In order to transmit the "telegram in suit by telegraph or telephone beyond "Wabuska, *it was necessary* that it be forwarded from "that point over the line of the Yerington Electric "Company to Yerington" (Agreed Statement, Tr. 68).

The regular charge for transmitting said message as an *unrepeated message* from Oakland to Yerington, including the tolls of the connecting line, which were collected at the initial office, was 98c. The total charge for transmitting said message as a *repeated message* was $1.47 (Finding X, Tr., 53). The regular charge for transmitting the same as an *insured message* under the terms of the contract of transmission and upon the basis of value claimed for it was $112.50 in addition to the usual charge for a repeated message.

The plaintiffs claimed they paid $1.45 for the transmission of the message. Defendant's agent disputed this and claimed payment was made only for an unrepeated message, but testified that if the amount received was more than that, it was paid by mistake. The Court found, as alleged by plaintiffs, the amount paid was $1.45, for which sum it was found defendant's

agent, on behalf of defendant, "agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said Town of Yerington for said plaintiffs and *insured to plaintiffs such immediate transmission and such immediate delivery thereof as aforesaid*" (Tr., 52, also Finding XII, Tr., 56). It was shown by the deposition of H. Hironymous, the manager of the Yerington Electric Company, that the office at Yerington was not a night office, and no messages could be received between 9 o'clock at night and 7 o'clock the following morning.

The message was filed in Oakland at 8:50 P. M. April 29th (see original Exhibit No. 3 on file, and Tr., p. 139). It was stipulated (Tr., 70) that it was transmitted to and received at Reno, Nevada, prior to the hour of 9:30 the same evening. The Court found that the defendant did not promptly transmit the message to Wabuska nor deliver the same to the connecting line at that point until May 2d, 1907; that the delay occurred wholly on the lines of the defendant (Finding XV, Tr., 58), and ~~not~~ that defendant, with what the Court finds to be gross negligence, delayed the delivery of said message so long said message was not delivered to or received by said Lyon County Bank until May 2d, 1907 (Tr., 59).

The Bank received the registered letter containing the draft between 8:30 and 9 o'clock on April 30th, and made payment to Pitt and Campbell upon the contract.

The Court found that plaintiffs made no further payment on the contract, but forfeited and lost what had been paid.

The Court found upon the conflict of testimony that the shares of stock referred to in said contract have been at all times since and including the 29th day of April, 1907, practically valueless (Tr., 60) and awarded judgment for plaintiffs as above set forth. After judgment against it in said cause, the defendant obtained from this Honorable Court the writ of error to review said cause and assigned and now assigns as error the following:

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling and in not sustaining the defendant's demurrer to said complaint on file herein.

II.

The Court erred in overruling and in not sustaining defendant's demurrer to the first count of plaintiffs' complaint herein.

III.

The Court erred in overruling and in not sustaining defendant's demurrer to the second count of plaintiffs' complaint herein.

IV.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff Lange, as follows: "Q. Mr. Lange, did you read the stipulation on the back of the telegraph blank on which your message was accepted for transmission?" (Referring to the original telegram of April 29th.)

V.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff J. U. Hastings, as follows: "Q. Did the agent call your attention to any of those?" (Referring to stipulation on the back of the message.)

VI.

The Court erred in overruling defendant's motion for a non-suit interposed by defendant at the close of plaintiffs' evidence, for the reasons set forth in said written motion for non-suit, which was and is as follows:

> "We now interpose motion on behalf of defendant for nonsuit upon the ground that the plaintiffs have not proven any cause of action against the defendant and have not shown any negligence or any failure to perform and discharge its duty under the contract in sending this message."

VII.

The Court erred in finding and deciding as follows:

"That on the same day, but after the execution of said contract, plaintiffs arranged with said Lyon County Bank to treat any drafts they might send the bank in partial payment under the contract as gold coin, and to pay the amount of such drafts in gold coin to said Pitt and said Campbell for plaintiffs pursuant to the terms of said contract between plaintiffs and said Pitt and said Campbell and on account of the payments to be made thereunder."

VIII.

The Court erred in finding and deciding as follows:

"That thereupon said defendant, through its said agent, represented to said plaintiffs that said defendant would insure the immediate delivery of said message to said Bank at said town of Yerington, if plaintiffs would pay to said defendant the sum of one and forty-five hundredths dollars in lawful money of the United States, which said sum was in excess of said defendant's regular charges for transmitting such a message from Oakland to Yerington—defendant's said regular charges being the aggregate sum of its own tolls for the transmission of such a message from Oakland to Wabuska, plus the tolls of Yerington Electric Company for the transmission of such a message from Wabuska to Yerington. That plaintiffs thereupon accepted said proposal of said de-

fendant to transmit said message immediately and to insure its immediate delivery as aforesaid, and then and there plaintiffs delivered to said defendant said message in writing and paid the sum of one and forty-five hundredths dollars to said defendant, through its said agent, and defendant then and there accepted and received of plaintiffs said sum last mentioned, and thereupon, and in the presence of plaintiffs, said defendant, by its said agent, wrote upon said message and immediately below the date thereof, the words 'Deliver immediately,' and simultaneously therewith accepted said message for immediate transmission to said town of Yerington and for immediate delivery to said Lyon County Bank, and agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said town of Yerington for said plaintiffs, and insured to plaintiffs such immediate transmission and such immediate delivery thereof, as aforesaid:

IX.

The Court erred in finding and deciding as follows:

"That it is not true that defendant stated to plaintiffs at any time that there was no way of insuring the immediate transmission or delivery of said message, or the transmission or delivery thereof within any definite time, to the town of Yerington. That it is not true that defendant informed plaintiffs that the lines of telegraph of the defendant did not extend beyond the town of Wabuska, or that beyond that point the said mes-

sage would have to be transmitted over a connecting telephone line. That it is not true that defendant suggested to plaintiffs at any time that in order to hasten delivery of said message plaintiffs might write the words 'Deliver immediately' upon the face of the same, to be charged for at the usual rate of tolls. That it is not true that defendant did not, at the time said message was offered to, and accepted by it for transmission and delivery, as aforesaid, inform plaintiffs that it could not insure the transmission or delivery of any message beyond the lines of said defendant."

X.

The Court erred in finding and deciding as follows:

"That the sum of one and forty-five hundredths dollars, so paid to defendant for said message, was in excess of the defendant's regular and usual tolls for the transmission and delivery of the same as an unrepeated message, the usual toll therefor being ninety-eight cents. That the total charge for transmitting such a message as that herein referred to, from Oakland, California, to Yerington, Nevada, over the telegraph lines of defendant and over the telephone line of Yerington Electric Company hereinafter mentioned, as a 'repeated message,' was, at the date of said message, the sum of one and forty-seven hundredths dollars. And the Court finds that the said sum of one and forty-five hundredths dollars, by plaintiffs paid to defendant, was so paid and was by defendant accepted in consideration of the agreement and undertaking by

defendant immediately to transmit and immediately to deliver said message in such manner and under such classification as, pursuant to the rules and regulations of defendant, was required in order that defendant would insure to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank."

XI.

The Court erred in finding and deciding as follows:

"That said blank form was one furnished by defendant at its said office for the use of all persons desiring to send telegrams, and plaintiffs did not, nor did either of them, read the printed matter on said blank, and plaintiffs were not, nor was either of them, cognizant of the terms and conditions printed thereon, nor did the defendant or its agent call the attention of the plaintiffs, or either of them, to said terms or conditions, or to any of them."

XII.

The Court erred in finding and deciding as follows:

(See XII) "That defendant accepted said message for immediate transmission and immediate delivery thereof, and insured to plaintiffs the immediate transmission and immediate delivery thereof as directed."

XIII.

The Court erred in finding and deciding as follows:

"That defendant did not promptly, upon receipt of said message on the evening of April 29th, 1907, transmit the same to the town of Wabuska, in said State of Nevada. That defendant did not promptly deliver said message to said Yerington Electric Company for further transmission over the telephone line of said last named Company to the town of Yerington. That, on the contrary, defendant wholly failed and neglected to transmit said message to said Wabuska until May 2nd, 1907, and wholly failed and neglected to deliver said message to said Yerington Electric Company until May 2nd, 1907. That such failure and neglect of said defendant and the delay in the receipt of said message by said Lyon County Bank, as herein found, occurred wholly on the lines of telegraph of said defendant and was caused by defendant, and did not at all occur upon the lines of telephone of said Yerington Electric Company and was not caused by said last named Company."

XIV.

The Court erred in finding and deciding as follows:

(See XVI) "That defendant with what the Court finds to be gross negligence, delayed the transmission and delivery of said message so long that said message was not delivered to or received by said Lyon County Bank until the 2nd day of May, 1907."

XV.

The Court erred in finding and deciding as follows:

"That said 625,000 shares of the capital stock of Kennedy Consolidated Gold Mining Company, hereinbefore mentioned, have been, at all times since and including the 29th day of April, 1907, practically valueless."

XVI.

The Court erred in finding and deciding as follows:

"That by reason of defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed, to said Lyon County Bank, plaintiffs suffered damage and loss in the amount of the value of said draft, to wit, eleven thousand two hundred and fifty dollars; and that neither the whole nor any part thereof has been paid to plaintiffs, or to either of them, or at all."

XVII.

The Court erred in giving and rendering judgment in said cause in favor of the plaintiffs and against the defendant.

XVIII.

The agreement between Pitt and Campbell and plaintiffs herein, being plaintiffs' exhibit No. 1, was an absolute contract by the terms of which said plaintiffs herein were obligated to purchase 625,000 shares

of the capital stock of the Kennedy Consolidated Gold Mining Company referred to therein, and the Court erred in holding and deciding that said agreement was only an option for the purchase of said shares and in giving and entering judgment for the plaintiffs herein.

XIX.

The agreement between plaintiffs and defendant under which said telegram of April 29, 1907, in suit herein, was accepted for transmission, being plaintiffs' exhibit No. 3, provided that said defendant should not be liable for mistakes or delays in the transmission or delivery of unrepeated messages beyond the amount received for sending the same. The evidence shows that said message was an unrepeated message, and the Court erred in giving and entering judgment in favor of the plaintiffs for a greater sum than the cost of sending said message.

XX.

Said agreement for the transmission of said message, being plaintiffs' exhibit No. 3, provided that this defendant was by said agreement, made the agent of the plaintiffs without liability to forward said message over the lines of any other company when necessary to reach its destination. The evidence shows that it is necessary in order to reach its destination that said message be forwarded over the lines of the Yerington Electric Company from Wabuska to Yer-

ington, Nevada. The Court erred in holding and deciding that said defendant insured the immediate transmission and delivery of such telegram and in giving judgment for the plaintiffs herein and against the defendant for any sum whatever.

Plaintiffs below contend that their contract with Pitt and Campbell was one of option only, from which they were at liberty to withdraw at pleasure, and that had the telegram been delivered on the morning of April 30th, the bank draft would have been returned to them by the escrow holder.

Defendant below contends:

(1) That the contract of purchase was absolute in character and bound Lange and Hastings, the purchasers, as provided therein, "to buy, take and receive" said shares of stock and to pay for the same. They were therefore not injured by the delay.

(2) That there was no negligence upon the lines of the Western Union Telegraph Company, *and at least no gross negligence;* and if there were any delay at all on defendant's lines, it occurred at an intermediate point and is expressly covered by the terms of the stipulation on the message blank relating to repeated and unrepeated messages, which both the State and the Federal courts have held to be valid.

Regarding the stipulation concerning the liability of the Telegraph Company for the various classes of messages, it may be proper in this introduction to state that since the decision of the Court below, the matter of the validity of such stipulations has come before the Interstate Commerce Commission which Congress, in June, 1910, for purposes of uniformity in regard to the regulations concerning interstate messages, invested with jurisdiction to determine the reasonableness of rates and rules and practices of telegraph companies engaged in such interstate business. Said Commission has given its decision, which will be hereafter adverted to, holding that such stipulation is reasonable and valid. The message in this case was sent before the act of Congress was passed, but the stipulation involved here is the same as in the case which came before the Commission, in the case referred to, namely, *Cultra* v. *Western Union Telegraph Company,* decided May 17, 1917.

Before considering the questions relating to the transmission of the telegram and the rights and liabilities of the parties under the message contract, we will first refer to the nature of the agreement between the plaintiffs and Pitt and Campbell, for the purchase of the mining stock in question, and the extent of plaintiffs' obligations thereunder.

THE CONTRACT OF LANGE AND HASTINGS WAS AN ABSOLUTE AGREEMENT FOR THE PURCHASE OF THE STOCK, FROM WHICH OBLIGATION THEY COULD NOT BE RELIEVED BY THEIR OWN DEFAULT.

If the agreement had merely provided that the first parties agreed to sell for a price named and upon terms stated, and that the "rights of all parties should cease and determine" upon default in payment of any installment, it would clearly be one of option. But plaintiffs' contract with Pitt and Campbell, on the contrary, provides "that said parties of the first part agree to sell " and deliver to the parties of the second part, and " said parties of the second part *agree to buy, take and* " *receive,* etc., upon the following terms and condi- " tions." Then follow the terms and conditions of payment, namely, the price to be $75,000, which shall be payable as follows: $7,500 cash upon the execution of the agreement, the remainder in installments of $11,250 each. Provision is then made for depositing the stock in escrow with the Lyon County Bank, to be delivered upon final payment, the further provision constituting the bank the agent of the *first parties* to receive the payments and grant acquittances therefor, and then the forfeiture clause, which the Court held converted the contract into one of option, which we contend was error. This clause, which we believe is only the usual form of forfeiture clause inserted in contracts for the benefit of the vendor, does not provide that in default in payment the rights of the parties

shall cease and determine, but that in the event of any default in payment (1st) the bank shall be authorized to return the stock; (2nd) that all previous payments shall be forfeited, and (3rd) "that *thereupon* all rights of each of the parties hereunder shall forever cease and determine."

The construction which the Court put upon the contract we respectfully contend renders meaningless the agreement of the purchasers to "buy, take and receive" the stock. It gives the contract the same meaning it would have if that covenant were not in it. Under the ruling such a contract containing an agreement to buy, would impose no greater obligation upon the purchaser than does a contract which does not contain such agreement; by such ruling such covenant to buy and pay can be left out or put in without in any manner changing the meaning of the contract. We contend, and the authorities without serious exception hold, it is that clause, and not the forfeiture clause which determines whether the agreement is a contract to buy, or a mere option or privilege to buy.

If the Pitt and Campbell contract, without other alteration, had been only an agreement to *sell,* and Lange and Hastings had failed to make the payments, as prescribed, the seller would have had no other remedy than to retake the stock; but by the insertion of the covenant to "buy, take and receive" the stock, the seller was given the option upon default to enforce that agreement, or to recover the stock. If the pur-

chaser agrees to buy and to pay the price named, he cannot relieve himself from this obligation by failing to do it. This has been the uniform interpretation put upon forfeiture clauses in contracts which contain the absolute obligation to buy.

THE RIGHTS OF THE PARTIES UNDER THE TERMS OF THIS AGREEMENT CEASED NOT UPON THE DEFAULT IN PAYMENT, BUT UPON THE RETURN OF THE STOCK.

The bank was not directed nor compelled to return the stock upon default in payment; it was only given authority to do so. The previous payments made by the purchasers would not be forfeited under the contract until the sellers had reclaimed the stock. The words of the contract "that thereupon all rights, etc., shall cease," do not relate to the default in payment but to the return of the stock. We interpret the transaction to mean that Lange and Hastings by their contract agreed that if payment was not made, Pitt and Campbell would then have a right to retake the stock, and in such case the bank was authorized to deliver it, and "thereupon all rights of the parties should cease." Certainly the purchasers, who were not in default, could not direct the bank to return the stock. That right was with the seller. If all the rights of all the parties ceased upon the default in payment, *then even the right of Pitt and Campbell to the return of the stock ceased.* If the purchasers failed to make a payment which was due on the first day of month, then

the sellers, under the construction given the contract, could not on the 2nd, nor the 3rd, nor at any time thereafter, claim the stock, because, as argued, their rights had ceased upon default in payment. Clearly, they had the right to receive the stock, and *this right was derived from the contract* and could be exercised at any time *after* the default in payment. The stock was delivered to the bank and was *endorsed.* The bank had no authority to deliver to any one, except under the contract. Upon default in payment the bank was authorized to deliver the stock, but the rights of the vendors under the contract did not cease upon default in payment. It would cease only after they had received the stock and thus worked the forfeiture of the previous payments. The contract provides that *thereupon* the rights of parties cease. Until then the plaintiffs were under contract to buy, because by the terms of the contract *they had agreed to buy* and the payment on April 30th was a payment they were obligated by the contract to make.

This is important because there is no evidence that the stock has ever been returned to Pitt and Campbell or that they had ever demanded its return. It was found that plaintiffs made no further payments, but there is no evidence that Pitt and Campbell refused or would refuse further payments, or had terminated the contract by retaking the stock.

VENDOR COULD NOT ESCAPE OBLIGATION TO CONVEY BY FAILING TO CONVEY.

If this contract had provided that in the event of the default of *either* of the parties in performing *any covenant contained therein,* "all rights of each of said parties hereunder shall forever cease and determine," it would probably not be contended, and certainly has not been decided, that upon the full payment of the purchase price, the sellers could relieve themselves from the absolute obligation to convey by failing to convey. It may be, as was said in the opinion, that individuals might have the right to so contract if they saw fit, but the courts will not ordinarily construe such contracts to have intended such results, nor hold that in any case a party to a contract can be relieved of his own obligation by merely failing to perform it, or that he can in any way claim an advantage through his own default. An obligation which may be rescinded by either party at his pleasure is not a contract at all. Of course, where there is no agreement *to buy,* there is no failure to perform.

We will illustrate our contention concerning the construction of this contract in another way. If the payment due on or before May 1st had been delayed, and had not been offered at the bank until May 2nd, Pitt and Campbell would have had the undoubted right to demand the return of the stock and the bank, by the terms of the contract, would have been authorized to deliver it, and if the bank had returned it under

such circumstances, the rights of all the parties would "thereupon" have ceased. But if the purchasers had offered payment on the 2nd day of May before the stock had been returned or demanded, it is clear they would have had the privilege of paying, for the rights would not have yet been cut off or have ceased or have been determined by the return of the stock. Certainly the right of Pitt and Campbell, under the contract, to receive the stock would not cease until they got it, for if it did then they would have no right to demand its return. They would have no right to demand it, if their rights had ceased.

THE FEDERAL AND STATE AUTHORITIES ON THE CONSTRUCTION OF SIMILAR CONTRACTS.

There is an abundance of cases reported relating to contracts in which the forfeiture provides that upon default in payment the rights of the *purchaser* shall cease, or that the contract shall be null or void at the *election of the vendor*. These authorities are of no value here. In our review of the cases, we have cited only those which provide that upon such default *all the rights of the parties* shall cease or such contract be void and of no effect.

In the recent work of *James on Option Contracts,* the author, at Section 109, under the topic of "Option Distinguished From Agreement of Sale," states the rule as follows:

"Where the parties mutually stipulate the seller

to sell and the buyer to buy, and it is further stipulated that if the buyer fails to perform, he shall forfeit certain payments made and the agreement shall be void, the instrument should be construed as an agreement of sale, that is, as binding upon the vendee to purchase and the forfeiture clause as a penalty and, therefore, for the sole benefit of the vendor. Otherwise it would be within the power of the vendee, by his own default, to terminate the agreement without liability to the vendor."

In

Stewart v. *Griffith,* 217 U. S., 323,

the forfeiture clause was fully as comprehensive as in the present case. The question here involved is exhaustively considered and especially the meaning and effect of such clause in connection with the *covenant of the purchaser to buy.* The contract in that case provided:

"If such balance be not paid on a specified date, the amount paid is to be forfeited and the contract of sale and conveyance to be *null and void and of no effect in law.*"

The chief consideration of the Court was to determine whether the contract did contain *an obligation to buy.* Without that covenant the contract would be construed to be void as to both parties.

With such agreement it would be void at the election of vendor. The Court says (p. 328):

> "It is said that the *defendant made no covenant,* and therefore was free to withdraw if he chose to sacrifice the $500 that he had paid. This contention should be disposed of before we proceed to the other questions in the case."

and, p. 329:

> "The tenor of the 'agreement' throughout imports *mutual undertakings.* The $500 is paid as 'part purchase price of the total sum to be paid'; that is, *that the purchaser agrees to pay.* The land is described as 'being sold.' There are words of present conveyance, inoperative as such, but implying a concluded bargain, like the word 'sold' just quoted."

and again, p. 329:

> "Here is an absolute promise in terms which it would be unreasonable to make except on the footing of a similar promise as to the main parcel that the purchaser desired to get. *We are satisfied that Stewart bound himself to take the land.* See *Wilcoxson* v. *Stitt,* 65 Cal., 596, 52 Am. Rep., 310, 4 Pac., 629; *Dana* v. *St. Paul Invest. Co.,* 42 Minn., 195, 44 N. W., 55. The condition plainly is for the benefit of the vendor, and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void'

means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice. *Knickerbocker L. Ins. Co.* v. *Norton,* 96 U. S., 234, 24 L. ed., 689; *Oakes* v. *Manufacturers' F. & M. Ins. Co.,* 135 Mass., 248, 249; *Titus* v. *Glenn Falls Ins. Co.,* 81 N. Y., 410, 419."

One of the leading cases which has been widely quoted is

Wilcoxson v. *Stitt,* 65 Cal., 596.

Quoting from the decision in *Mason* v. *Caldwell* (p. 598):

"The defendant contends that he can take advantage of this clause, and because he did not pay the money as he had agreed to do, he is exonerated from paying it at all. It is argued that because the obligee, in the event of non-payment, may treat the bond as determined, mutuality requires that the obligor should have the same privilege. This argument refutes itself. It is as much a *felo de se,* as it would make the bond. To admit the defendant's position is to leave everything in his own hands. It allows him to defeat, or make the bond operative, as may best subserve his interests, without any discretion on the part of the obligee. It converts the bond into a naked proposition, absolutely binding on the seller, but which the purchaser may accept or reject by the payment or non-payment of the money. By thus putting the entire control in the hands of the latter, all mutuality is destroyed. *It was the undoubted inten-*

tion of both parties when they inserted this clause to provide a penalty to insure a prompt performance by the purchaser."

The contract in the Wilcoxson case provided that upon *default of payment,* "this agreement shall be void." The contract under consideration provides that in default in payment the bank shall be *authorized to return the stock* and the previous payments shall be forfeited, and "thereupon" all rights of each of the parties shall cease. A contract becomes void when the rights of the parties thereto have ceased, and conversely when rights of all parties have ceased, the contract has become void. The terms are synonymous. If in the Wilcoxson case the contract was merely voidable at the election of the vendor, the same meaning must be ascribed to the equivalent expression in this case, and the rights of the parties hereto be held to "cease and determine" at the election of the seller and not of the party who is in default.

In *Central Oil Co.* v. *Southern Refining Co.,* 154 Cal., 165, there was a mutual agreement to buy and to sell certain quantities of oil upon conditions of payment specified, as in the present case. The contract contained this clause:

> "The violation of any of the terms or conditions thereof by *either* party hereto shall work a forfeiture hereof. This agreement shall thereupon become void and of no effect."

This is the type of agreement above referred to, where, under plaintiffs' contention, it would be just as permissible for the seller after full payment, to be relieved from his obligation to convey, by refusing to convey, as it would be for the purchaser to be relieved from his obligation to pay by refusing to pay.

The defendant, the Southern Refining Co., refused to take or pay for oil and the plaintiff sued for breach of the contract. The Court says (pp. 166-167):

> "Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became 'void and of no effect'; that this provision means that the violation terminated the contract and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That language means that by a violation of the terms of the contract the rights of the party violating it cease, and as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for *'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all'* (9 *Cyc. of L. & P.*, p. 618). Per-

formance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party (*Civ. Code,* secs. 1511, 1512, 1514). Such has uniformly been the construction put upon language such as this when found in contracts."

In *Weaver* v. *Griffith* (Pa.), 59 Atl., 315, the forfeiture clause was even stronger than in the present case, because it provided that upon *default in payment only,*

"The agreement is to be null and void *and all* parties are to be released from *all liabilities* hereunder and all money previously paid forfeited."

There is no right without a corresponding liability. The Court in the Pennsylvania case held that the failure to make the payments at the stipulated times *did not of its own force terminate the contract.* As the opinion is in one paragraph and is confined to the construction of the above clause of the agreement, it is quoted here in full:

"The defendant might have terminated the contract under the clause that 'In case the said party of the second part doth not make payment as above specified at the time herein stated then this agreement is to be null and void, and *all* parties are to be released from *all* liabilities herein and all

money previously paid forfeited.' But the failure to make the payments at the stipulated times did not, *of its own force, terminate the contract.* It was not one of option, but of sale and purchase, and *prima facie* the time of payment was not of its essence. While a contract may provide that it shall be terminable at the will of either party, so that a purchaser may even terminate it by his own default, yet such effect will not be given to it unless the intent of both parties to that effect be made apparent by clear, precise, and unequivocal language. The presumption is that the forfeiture clause is for the benefit of the vendor, and enforceable at his election. Without such election and action the purchaser would not be released from his obligation to pay, and equally the vendor would continue to be bound by his agreement to sell. In the present case the court below found as a fact that the defendant had not elected to enforce his right of forfeiture, but by his conduct had substantially waived it. Thus retaining his right to enforce the contract against the purchaser to buy, he equally kept alive his own obligation to sell.

"Decree affirmed."

It will be remembered that the agreement with Pitt and Campbell under consideration does not even provide that the rights of the parties should cease on failure to pay, because very important rights were still to be exercised. It, in effect, provided that the rights should cease upon the return of the stock, which the evidence *does not show has ever been re-*

turned, or that the vendors took any action to forfeit the previous payment. Under the Weaver case, *supra,* even if the contract in suit had provided that the rights of the parties should cease upon failure to pay, the contract would not "of its own force" have been terminated. The option in such case would be with the seller.

In *Vickers* v. *Electrozone Co.* (N. J.), 48 Atl., 606, the Court was construing a provision of the contract:

> "By force of which (in terms) the failure by the party of the second part to perform the agreement *ipso facto* puts an end to it,"

and said:

> "It would be an extraordinary construction of this agreement to make it confer upon a party the power to make his own default in not performing his part of the agreement the discharge of his obligation to perform it."

We also call the Court's attention to the language of the courts in the English cases cited in this opinion.

Also in the case of

Hamburger v. *Thomas,* 118 S. W., 770,

the Court in construing the forfeiture clause, had first to determine whether the contract contained an agreement to buy. The option clause provided that if the title to said property, in the opinion of the purchasers, was good and said property was not taken within

the time specified "then the $1000 herein receipted "for shall be forfeited to W. W. Thomas and our- "selves equally as liquidated damages, *and this receipt "shall then be null and void and all parties herein "named released.*" The Court held that the contract was not an option but a contract of sale which could be enforced by either party. It is said (p. 773):

> "This is not a mere 'option' by which is meant a contract by which the owner of the property agrees with another that he shall have the right to buy his property within a certain time. By this (meaning an option) the owner does not sell his property nor agree to sell it, but sells simply the right or privilege to buy at the election of the other party (citing cases). But, as is before said, it is a contract of sale. It shows a contract which, upon its breach, the other can enforce."

The rule in regard to insurance contracts is that the usual forfeiture clause providing that upon the failure to pay the premiums at the time stated, the contract is to be null and void, is a provision inserted for the benefit of the insurer who may waive it and enforce the contract. In the case of

> *Knickerbocker Life Ins. Co.* v. *Norton,* 96 U. S., 234,

the policy contained this provision:

> "If the said premium shall not be paid, etc., at the time the same shall become due and payable,

> then and in every such case, the company shall not be liable to pay the sum assured, nor any part thereof; and said policy shall *cease* and be null and void without notice to any party or parties interested herein."

It was held that the clause was intended for the benefit of the insurer and that the company was not bound to insist upon the forfeiture but might waive it.

At the argument of the case below, *plaintiffs* relied chiefly upon the cases of

> *Gordon* v. *Swan,* 43 Cal., 564, and
> *Williamson* v. *Hill,* 27 N. E., 1008.

Gordon v. *Swan* has no application because there was no obligation to buy.

For the same reason the case of *Williamson* v. *Hill* has no application. The Court says that:

> "The stipulation that a payment of $100,000 at any time within two years might stand instead of $250,000 to be paid year by year indicate that *this was not considered an absolute sale.*"

We respectfully contend that the contract did not provide that the rights of the parties should cease upon the failure to make payment, but that the clause under consideration was inserted for the benefit of the sellers who had the option to direct the return of the stock, and thus cause the forfeiture of previous payments, and "thereupon," that is, upon the for-

feiture of payments and return of stock, "the rights of each of the parties should forever cease and determine."

THE DEFENDANT IS NOT LIABLE IN THIS CASE, EVEN IF THE CONTRACT WERE ONE OF OPTION ONLY.

Assuming even that the contract was one of option, the *vendors* were bound thereby until default made. It was a *continuing offer* of sale to plaintiffs until May 1st when the next payment was due. This offer was accepted by the mailing of the bank draft on April 27th, and the letters of transmissal to the escrow holder advising the bank which was *"the constituted agent of said parties of the first part for the purpose of receiving any and all payments,"* that the draft was sent for the purpose of making the payment. The acceptance of this offer of sale could be made by post, and the contract to buy became complete and binding when the letter of acceptance was mailed. Any subsequent attempt to withdraw the acceptance was ineffective.

Sections 1582 and 1583 of the Civil Code of California codify the general rule in regard to the acceptance of proposals. Under these provisions the consent is deemed to be fully communicated between the parties as soon as the party accepting the proposal has put his acceptance in the course of transmission by any reasonable and usual mode.

In *Burton* v. *U. S.*, 202 U. S. 384, it is said:

> "It is to be taken as settled law, both in this country and in England, in cases of contract between parties distant from each other, but communicating in modes recognized in commercial business, that, when an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded, when the offer is accepted in reasonable time, either by telegram, duly sent in the ordinary way, or by letter, duly posted to the proposer, provided either be done before the offer is withdrawn, to the knowledge of, or upon notice to, the other party."

In *Brauer* v. *Shaw* (Mass.), 46 N. E., 617, the syllabus is as follows:

> "An offer by defendants to let cattle space in a steamship, subject to prompt reply, was wired at 11:30 a. m., and received by plaintiff at *12:16* p. m. At 12:28 p. m. plaintiff telegraphed an acceptance, which did not reach defendants till 1:20 p. m., and in the meantime, at 1 p. m., the latter wired a revocation, which plaintiff received at 1:43 p. m. *Held, that defendants were bound.*"

It is not necessary that the proposal should have been made by mail to justify an acceptance in that manner. Where the parties are distant from each other, as in this case, the mail was the reasonable and usual mode of communication.

> "Posting an acceptance of an offer may be suf-

ficient when it can fairly be inferred from the *circumstances of the case* that the acceptance might be sent by post."

Beach on Modern Law Contracts, Sec. 61.

If thereupon the contract was not in itself an absolute agreement to buy, the agreement became absolute upon the mailing of the acceptance of the offer on April 27th.

THE BANK DRAFT BECAME THE PROPERTY OF THE ADDRESSEE WHEN IT WAS DEPOSITED IN THE MAIL AND THE BANK HAD NO AUTHORITY TO RETURN IT.

Plaintiffs argued this case upon the assumption that the payment was not complete until Pitt & Campbell had themselves received the money, or the credit, from the escrow holder. But it was immaterial to the rights of plaintiffs when the vendors actually received the money or the credit. Plaintiffs would have lost no rights if Pitt & Campbell had not been paid at all. By the terms of the contract, the "said Lyon County Bank is hereby constituted the agent of said parties of the first part for the purpose of receiving any and all payments." Payment to the agent was payment to the principals. It was not necessary to await any bookkeeping entries by the bank. If the draft, when it was deposited in the mails, or even when it came into the actual custody of the bank, became the property of the bank

as the addressee, it then became the property of the principals. The telegram requesting its return, had it been promptly delivered, would not have changed the legal relation of the parties. The bank would have had no authority to return the draft, *and the officers of the bank testified they would not have returned it.* The draft was intended to be used for payment. It was treated as coin. The draft was not cashed but was itself credited on the agreement. Plaintiffs are estopped from saying it was not worth its value, or was not intended for payment. When it came into possession of the bank, Pitt & Campbell could not have forfeited the contract because payment was not made. Plaintiffs' own evidence showed the draft was treated as gold coin. See Deposition of Assistant Cashier Geo. F. Willis, "read by plaintiffs' counsel as a part of their case" (Tr., 108).

THE AUTHORITIES.

On the proposition that the letter and its contents, when deposited in the mail, became the property of the addressee. In *22 Am. & Eng. Enc. 1057,* it is said:

> "After the letter is placed in the post office it passes out of the control of the sender and into that of the person to whom it is directed, and the postmaster or post office department is his agent to forward the letter to him. The right of the

addressee being a property right, he cannot be deprived of it except by due process of law."

U. S. v. *Thayer,* 154 Fed. 508, is directly in point. The defendant mailed a letter soliciting a subscription for a political purpose, addressed to an officer of the United States in the building occupied by him in discharge of his official dutes, all in violation of the federal statute. The Court said (p. 511):

> "When, in contemplation of law, did the letter cease to be the property of the defendant, and for whom was the post-office establishment acting in forwarding and delivering it? By quite a uniform line of decisions it is held that after a letter is placed in the post office it passes out of the control of the sender and into that of the person to whom it is directed, and the postmaster or the Post-Office Department is his agent to forward the letter to him. 22 American & Eng. Enc. of Law (2d Ed.), 1057; *U. S.* v. *Nutt,* Fed. Cas. No. 15,904; *Com.* v. *Wood,* 142 Mass., 459, 8 N. E. 432; *Regina* v. *Jones,* 4 Cox, C. C. 198; *Kennedy* v. *Dr. David Kennedy Corp.,* 32 Misc. Rep. 480, 66 N. Y. Supp. 225. If this be true, defendant was not the owner and had no control over the letter after it was confided by him to the mails of the United States Thereafter it was the property of the addressee, and in the possession of his agent for forwarding.

To the same effect is

U. S. v. *Nutt,* Fed. Cas. No. 15904;
Commonwealth v. *Wood,* 104 Mass., 459;

Kennedy v. *Dr. David Kennedy Corp.*, 66 N. Y. Supp. 225.

The case of

Patrick v. *Bowman,* 144 U. S., 411,

is frequently cited but the facts were somewhat complicated by reason of the number of letters and telegrams which were exchanged between the parties, some of which were never received. The following rule stated in the syllabus (L. ed.) was applied:

> "Where an offer is made and accepted by the posting of a letter of acceptance before a notice of withdrawal is received, the contract is not impaired by the fact that revocation had been mailed before the letter of acceptance."

For the above reason, the bank, had it received the telegram would have had no authority to return the draft. The contract was absolute, and, if not, the draft and letters of transmissal became the property of the bank as the authorized agent to receive payment, and were therefore the property of the principals.

THE ALLEGED PRIVATE ARRANGEMENT WITH THE BANK.

Defendant respectfully contends that the Finding VI that the arrangement about making payments by draft was made after the execution of the contract, is not supported by the evidence, but that it was

intended by the plaintiffs that the bank draft itself should be applied in payment upon the contract. The deposition of George F. Willis, the officer of the bank who conducted the transaction, and which was read in evidence by plaintiffs' counsel, as a part of their case (Tr., 108) shows, that the conversation about the form of future payments was had "at the time the contract was made" and not afterwards. The first payment, as the contract shows, was made at the time of "the execution of the agreement," and the reference to the future payments and the conversation referred to occurred at that time. Mr. Willis testified (Tr., 110-111):

> "I had explained to him that *as we treated their San Francisco exchange as cash,* crediting Pitt & Campbell up with *it* immediately on receipt of the same, we should have some exchange, etc." (Tr., p. 112).

Plaintiffs contend that the letter and telegram in suit only related to this alleged "private" arrangement for the cashing of the draft. The contention is contradicted by the *pleadings,* the *letters of transmissal,* the oral *evidence,* plaintiffs' witness and the *Stipulation of Facts.*

THE PLEADINGS.

There is nothing of this private agreement in the pleadings. The complaint alleges that the bank draft was sent, not for the purpose now claimed, but "for the purpose of *making the payment* mentioned in said contract between the plaintiffs and said Pitt and said Campbell" (Tr., p. 6), and, again, it is alleged "that for the purpose of making said pay-" ment, they had mailed from Oakland to said Lyon " County Bank, at said Town of Yerington a certain " bank draft in the sum of *$11,250, gold coin* of the " United States, payable to order of said Lyon Coun-" ty Bank," which was the escrow holder (Tr., p. 8). It is further alleged that "said draft was worth $11,-250, *gold coin,* and would have been honored" (Tr., p. 6). It also appears that it was intended that the said *draft* mailed to said Lyon County Bank should *itself* be *"credited by it to account of said Pitt & Campbell"* (Tr., p. 7).

THE LETTERS.

The letters from plaintiffs transmitting the draft did not refer to any arrangement that had been made for advancing gold coin under privte agreement with the plaintiffs which the bank, as plaintiffs' agent, was to pay to Pitt & Campbell. On the contrary, the letters state that the draft was sent for the pur-

pose of making the payment. The letter accompanying the draft, which was registered, stated:

> "Enclosed herewith we hand you draft for $11,250 issued by Bank of Fruitvale on First National Bank of San Francisco, *to apply on escrow you hold from J. U. Hastings and myself and Messrs. Pitt & Campbell.* The banks here assure me they will not charge any exchange."

The letter of the same date from plaintiffs advising that the draft had been mailed, read as follows:

> "We this day forwarded you by registered mail a draft for $11,250 *to apply on payment due you under* ESCROW to Messrs. Pitt & Campbell and ourselves."

THE EVIDENCE.

Mr. Willis, who handled the escrow matters for the bank, testified as follows (Tr., p. 111):

> "Q. Did you treat the draft so received as gold coin?
> "A. We did. We credited *it* up immediately."

THE STIPULATION.

The Stipulation of Facts, paragraph 9 (Tr., p. 70) recites:

> "That on April 30th, 1907, and after the bank draft referred to in plaintiffs' complaint was received by the Lyon County Bank, said Bank, *as*

was intended by the plaintiffs in forwarding the same, treated said bank draft as gold coin, as explained by the evidence in the cause, and gave credit for the amount thereof to plaintiffs herein upon the escrow agreement."

It will be seen from the above that the bank did not handle the draft in the manner now contended by plaintiffs' counsel, and it was not sent in pursuance of any private arrangement with the bank to advance gold coin to Lange and Hastings and then, acting for Lange and Hastings, pay the gold coin to Pitt & Campbell. The draft was sent *to apply on the agreement for the purpose of making payment,* and was by the bank credited on the escrow agreement exactly according to instructions. Pitt & Campbell never did receive the gold coin, and if, as contended, payment could not be made through any other medium, plaintiffs' claim must still be against the bank.

If, by means of this bank draft, which it is alleged was worth the amount thereof in gold coin, plaintiffs undertook to make the payment which was due, intending the draft to be credited upon the escrow agreement, it is not for plaintiffs to contend that the payment was irregular, or that the contract had not been complied with. If the act of plaintiffs in sending the draft *to make the payment, was sufficient to have bound the plaintiffs if the alleged private arrangement had not been made, then the making of such private arrangement would not change the rela-*

tion of the parties. If the pleadings and the written evidence explaining the purpose of the draft had shown that it was not intended to be received in payment, but that it was sent for the purpose of providing a fund which the bank was to set apart and then pay to Pitt & Campbell, the alleged private arrangement may have had some bearing on the case, but the complaint in the case is not based upon that theory and the evidence refutes it. If the telegram had been sent for the purpose now contended, defendant should have had an opportunity to traverse the pleading and try the case upon that issue.

Plaintiffs allege that if the telegram had been received the draft would have been returned. The bank officials, witnesses for plaintiffs, whose depositions were taken, deny this and say that they would have held the draft. The escrow agreement provides that the bank is constituted the agent of Pitt & Campbell to receive the payment. The officials testified that the draft was treated by them as *gold coin* and *credited on the agreement.* The complaint and the letters transmitting the draft state that it was sent for that purpose. The telegram was not intended to prevent the bank from coming into possession of the draft, but it was assumed that the bank would receive it; so the situation is practically the same as if plaintiffs had sent gold coin, or its equivalent, to Pitt & Campbell themselves, but had telegraphed them to return it upon its receipt. The money or

draft, upon its receipt, became the property of Pitt & Campbell. Our contention is that Pitt & Campbell acquired the title to the draft when it was deposited in the mail, but certainly when it came into the actual possession of the agent appointed to receive it.

QUESTIONS RELATING TO THE TRANSMISSION OF THE TELEGRAM IN SUIT ARISING OUT OF THE STIPULATIONS UPON THE MESSAGE BLANK.

Plaintiffs count upon an alleged *contract of insurance* of immediate delivery and then allege negligence in the breach of this *insurance contract.* The complaint alleges in the first count the contract with Pitt & Campbell, the mailing of the draft "to apply upon the payment," the sending of the telegram, the explanation to the agent as to its purpose, and then alleges "that thereupon said defendant, *through its* said agent, *represented to said plaintiffs that defendant would insure the immediate delivery of said message,*" for a given consideration, and *"plaintiffs thereupon accepted said proposal* of said defendant to transmit said message immediately *and to insure its immediate delivery* as aforesaid" (Tr., p. 10). It then charges that the defendant negligently delayed the transmission and delivery, contrary to the agreement. In the second count of said complaint it was alleged (Tr., p. 17),

"that said defendant would *insure* plaintiffs against

all *loss or damage* that they might sustain arising out of any failure on the part of defendant to immediately send or immediately deliver said message to Lyon County Bank; that thereupon plaintiffs paid the defendant the sum of one and forty-five (1.45) hundredths dollars for the immediate sending and immediate delivery of said message and for the *insurance* thereof as *herein stated,* and delivered said message to the defendant which received the same under agreement that it would immediately send and immediately deliver the same to said Lyon County Bank at Yerington, Nevada, and that it would *insure* plaintiffs against all *loss or damage* that they might sustain arising from any failure on the part of defendant."

The plaintiffs have here alleged, and said action is based upon, an oral contract of *insurance against loss or damage* for failure to make immediate delivery of a correctly transmitted copy of said message. We respectfully urge that a finding based upon such oral agreement of insurance was error.

The message was sent under a written contract which is binding upon the parties and directly opposed in terms to the oral contract pleaded and found. See Finding XI, Tr. 53-55, setting out said written contract. It is here provided that the message was sent subject to these terms thereof *which are agreed to.* This agreement provides that as to *insured messages,* the contract shall be in *writing,* and a certain premium paid in addition to the cost of transmission, and that *"no employee of the com-*

pany is authorized to vary the foregoing." It is therein provided that the premium for insurance upon such a message against loss or damage in the amount claimed by plaintiffs would have been *$112.50,* in addition to the cost of transmission. Plaintiffs were charged with notice of the terms of this agreement. *Primrose* v. *Western Union Tel. Co.,* 154 U. S. 1; see page 25. Plaintiffs claimed an *oral* contract of insurance against loss or damage in consideration of the payment of $1.45, which was the cost only of a repeated message. Plaintiffs were advised by the terms of the written contract that defendant's agent had no authority to enter into such oral agreement.

It was contended, however, that by the written contract, the provision for insurance relates only to the transmission of the message. But a message is not transmitted correctly, nor transmitted at all, until it is received by the addressee. The agreement to transmit a message involves the obligation to deliver. The provision of the message blank, relating to insurance, is clearly intended, when the premium is paid, to impose upon the telegraph company the obligation to deliver to the addressee a correct copy of the message. The delivery of an incorrect copy of a message though the same had been correctly transmitted would be a violation of the agreement; certainly therefore, it would not be contended that no delivery at all would be a compliance with it.

If the company accepted a premium of $112.50 in consideration of the insurance of "correctness in the transmsision of a message" and failed to make any delivery at all, it would not be heard to say that it never insured the delivery but only the transmission.

WHERE A MESSAGE MUST BE SENT OVER A "CONNECTING LINE" IN ORDER TO REACH ITS DESTINATION, THERE IS NO AUTHORITY IN THE AGENT TO INSURE EITHER CORRECTNESS IN TRANSMISSION OR DELIVERY.

The message contract provides (Tr. 54): "And this "company is hereby made the agent of the sender, *with-"out liability,* to forward any message over the lines "of any other company when necessary to reach its "destination."

It is stipulated in the Agreed Facts, paragraph 1, Tr. 67, that Wabuska

> "was the terminus of the Western Union Telegraph Company's lines for Yerington messages . . . and in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska, *it was necessary* that it be forwarded from that point over the line of the Yerington Electric Company to Yerington."

It is here admitted that it was necessary for the message to be sent over a connecting line and the written agreement provides that in order to forward such message, "this company is hereby made the agent of the sender, *without liability.*" Plaintiffs were here advised, and by said written contract in terms

agreed, that defendant's agent had no authority to incur liability under the so-called oral contract of insurance to deliver a message which had to be forwarded over a connecting line in order to reach its destination.

THE ABOVE CLAUSE IN THE MESSAGE CONTRACT PROVIDING AGAINST ANY AGREEMENT FOR LIABILITY WHEN THE MESSAGE IS TO BE FORWARDED OVER A CONNECTING LINE, IS VALID.

Jones on Telegraph and Telephones, Sec. 404;
Crosswell on Electricity, Sec. 444;
Western Union v. *Carew,* 15 Mich., 525;
Pennsylvania R. R. v. *Jones,* 155 U. S., 333.

The Company's agent was not authorized, and never intended, to make any contract of insurance. Witness Quinn testified that he suggested that the words "Deliver immediately" be written upon the face of the message, because, in his opinion, it would have more of a tendency to insure a hurried delivery than the word "Rush," but he charged for these words. Aside from any lack of authority vested in the clerk to enter into an oral contract of insurance of immediate delivery binding on the company, it is evident, from the testimony, that if anything was said about insurance at all, it was not understood by the parties in the same sense. Under the circumstances, there could have been no contract of insurance in the sense of an agreement for indemnity against loss or damage. If

Quinn used the term at all, it could only have been in the sense of giving some assurance of expedition and not the making of a contract of indemnity. The written contract controls. The plaintiffs were charged with notice that a contract of insurance could not be made except in writing, and upon the terms prescribed. We respectfully urge that the finding that the defendant's agent entered into an oral contract of insurance against loss and indemnity is not supported by the evidence.

If the alleged oral contract to insure plaintiffs against all loss and damage, in consideration of $1.45, paid by mistake if at all, is upheld in the face of the terms in the written contract between them, then there can be no security for the Company in such regulations, for whenever parties choose to testify such oral contract was made, and the courts believe them, *the written agreement is swept away,* and the right which the law gives to the carrier to adopt reasonable regulations is annulled.

THE GENERAL TERMS OF THE MESSAGE CONTRACT.

The printed stipulation on the message blank on which the plaintiffs in their own office prepared the message, provides for three classes of messages: "unrepeated," "repeated" and "insured," with a different rate and a different degree of responsibility for each class. It was optional with the senders of the message as to which class they would adopt. Plaintiffs claimed

they "put themselves in the hands of the agent" to abide his instructions. They had no more right than any other person sending messages to put themselves in the hands of the clerk. They had no right to a different service or to demand in their case a departure from the regular method of transmitting messages. Most telegrams are important. That is the reason the different classifications are made, giving the senders the option to select for themselves. The clerk had no authority to make a special rule, or to discriminate in favor of some particular person. There is no private or secret way by which plaintiffs could have their message transmitted by "putting themselves in the hands of the agent." All the receiving clerk can do is to receive the message and forward it according to the classification which the sender selects.

The toll on this message as an unrepeated message, assuming that pennies were not in use at that time, was $1.00; and as a repeated message, was $1.45. The premium for sending the same message as insured, "against all loss and damage they might sustain," according to the terms of the printed agreement, is $112.50. There was a dispute between plaintiff Lange and defendant's agent Quinn, as to the amount paid. Lange contended he paid $1.45. Quinn testified that he paid only $1.00. The Court found he paid $1.45. The message, therefore, was sent and paid for either as a repeated message or as an unrepeated message.

The oral testimony of the plaintiff upon which was based the finding of the Court that the message was sent as an *insured message,* or by which the defendant insured the plaintiffs against "all loss or damage they might sustain," was in conflict with the written contract. Plaintiff Lange testified that defendant's agent not only made a verbal contract of insurance but as evidence of it, wrote the words "Deliver immediately" upon the face of the message. Defendant's agent Quinn, as above noted, testified that he wrote the words "Deliver immediately" upon the face of the message because he thought it would tend to hurry the delivery and would be more effectual than the usual word "Rush."

THE FINDING OF GROSS NEGLIGENCE IS NOT SUPPORTED BY THE EVIDENCE.

The finding of gross negligence is based upon the assumption that the draft was paid because the message was delayed *three days* and that a delay of three days is gross negligence. But it was not the delay of three days which caused the alleged loss if at all; it was the delay of only a few moments, or, at most, not more than one hour, on the morning of April 30th. The Yerington office was not a night office. The message could not be delivered until morning. The testimony of plaintiff Hastings was that the company's agent "said that the message would be delivered without fail before banking hours the next morning" (Tr., 102). The

office opened about seven o'clock A. M., but messages accumulating during the night at Wabuska had to be transmitted and delivered in turn. It should have been delivered when the bank opened at 8:30 A. M., at which time the bank received its mail. If the message was to accomplish its purpose at all it was necessary for it to have been delivered, as stated in the complaint, "before banking hours the next morning." A very brief delay would have rendered the message useless. After the bank received the mail, certainly after it had credited the draft, it is immaterial whether the message was thereafter delayed three days, or was never delivered at all. Practically, therefore, the entire period of the delay of the message was after the draft had been paid. If the message had been delivered in time to intercept the draft, the delivery would have been prompt. Certainly the delay until after the bank had opened and the draft was paid was nothing more than ordinary negligence.

To illustrate: If the bank at Yerington had received its mail on the evening of April 29th, which Assistant Cashier Willis testified it might have done, or early on the morning of April 30th, the telegram, although promptly delivered, would have been ineffectual to stop payment of the draft. It would have been immaterial in such case how long thereafter the message was delayed. The draft was actually received between 8:30 and 9 o'clock. The question therefore

is, was the delay in the delivery of the message until after that hour gross negligence?

Gross negligence implies wilful misconduct or reckless indifference to the rights of others, which is not to be presumed from a failure to deliver the message immediately or, in this case, before banking hours on the morning of April 30th. In

Kiley v. *Western Union Tel. Co.,* 109 N. Y., 231,

the message was delayed or not delivered at all. The Court held that the failure was not due to wilful misconduct or gross negligence. This case was expressly approved by the Supreme Court of the United States in *Primrose* v. *Western Union Tel. Co.,* 154 U. S., 1, where the Court, speaking through Mr. Justice Gray, said, in reference to the Kiley case (p. 21):

> "It was not shown that the failure was due to the wilful misconduct of the defendant or to defendant's gross negligence."

In the Primrose case itself the loss arose from an error instead of delay which, however, was charged to be gross negligence. The Court said, in this connection (p. 27):

> "The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than *ordinary negli-*

gence; and that upon principle, and authority, the mistake was one for which the plaintiff, not having the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message."

In *Birkette* v. *Western Union Tel. Co.,* 103 Mich., 361, the damage was caused by delay. The facts were "that at *ten* o'clock plaintiff sent an unrepeated message to the office." "The message should have "been delivered in about half an hour, but was not "delivered until *two* o'clock P. M.—action to re- "cover damages for defendant's failure to promptly "deliver a telegram." It was held there was no gross negligence and the case came within the stipulation.

The cases of *Clement* v. *Western Union Tel. Co.,* 137 Mass., 463, and *Stone* v. *Postal Telegraph Co.,* 76 Atl., 762, were cases of delay in the delivery of telegrams which, however, was in each case not construed to be gross negligence. In *Williams* v. *Western Union Tel. Co.,* 203 Fed., 140, the negligence was in the transmission of the message. The Court said:

"There was no evidence of wilful misconduct or that any other want of care which would raise the presumption of a conscious indifference to consequences."

In *Halsted* v. *Postal Telegraph Co.*, 193 N. Y., 293, which was an error in transmission, the Court said:

"'However occurring, if by no wilful misconduct, a mere mistake, or error, in the transmission of a message, would not warrant a jury in finding that there had been *more than ordinary negligence.*' . . . To justify a recovery in this case it was incumbent upon the plaintiffs to establish an absence of contributory negligence upon their part and *gross neglect upon the part of the employes of defendant. The onus thus imposed was not satisfied by proof of error in the transmission of the message.* . . . In the view we take of the evidence *it was the duty of the trial justice to hold as a matter of law that there was a failure of evidence to show gross negligence.* . . . The conclusions reached in this case do not tend to subject the public to the mercy of a telegraph company. While such a corporation is invested with certain privileges to be exercised by it for the public benefit, its liability must be measured by reasonable limitations. The opportunity is afforded to one doing business with it to protect himself from danger incident to error likely to arise. A failure to exercise the privilege extended at a small expense may result in a loss which might have been obviated by the injured party in the first instance. *To hold that under the facts in this case gross negligence had been established would enable a party in nearly, if not every case, to have a jury determine that a liability existed, when as a matter of fact only the absence of ordi-*

nary care was disclosed, and thus render telegraph companies liable as insurers of the accuracy of messages notwithstanding their contracts."

THE CHARACTER OF THE MESSAGE.

Plaintiffs deny that the message was a repeated message, but claim that they paid the sum of $1.45, which was the repeated message rate. Defendant claims that it was an unrepeated message and only $1.00 was paid. The Court found that the amount paid was $1.45. It must therefore have been either a repeated or an unrepeated message upon which the liability, as stipulated upon the message blank, would be either the cost of transmitting the same or fifty times the cost of such transmission. In either case the judgment would be error. We are, therefore, concerned with the validity of the stipulations upon the message blank with regard to the defendant's liability.

THE CONTRACT BETWEEN THE PLAINTIFFS AND THE DEFENDANT RELATING TO LIABILITY FOR UNREPEATED MESSAGES IS VALID AND CONCLUSIVE UPON THE RIGHTS OF THE PARTIES.

There has been much controversy throughout the various State courts over the validity of the above clause of the message contract. In some States this stipulation or agreement has been held to be void as against public policy, but the question is settled to the contrary in the Federal courts and in the courts of

California and recently by the Interstate Commerce Commission. In

Primrose v. *Western Union,* 154 U. S., 1,

the Court reviews the leading cases to this controversy and holds that the above provision of the message contract is valid, saying it is not an exemption from liability for negligence, but that "the party sending the message has the option to send in such a manner as to hold the company responsible, *or to send it for a less price at his own risk.*"

Referring to the Illinois case which advanced the principal arguments against such stipulation, the Supreme Court in the Primrose case says:

> "The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again, if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message."

It has been said that the Primrose case related to an error in transmission, which is true, and yet in view of the great conflict of authorities in various States, the

Court has given a broad discussion to the question whether the stipulation on the whole was reasonable.

But in *Western Union* v. *Coggin,* 68 Fed., 137, the damage claimed was caused *solely by delay* or failure to deliver. The Court says (p. 138-9):

> "This case was brought and tried before the case of *Primrose* v. *Telegraph Co.,* 154 U. S., 1, 14 Sup. Ct., 1098, was decided. Since the decision in that case it has been the settled law in the federal courts—First, that the conditions contained in the stipulation quoted, subject to which the unrepeated message of the plaintiffs was sent, are reasonable and valid; second, that, under these stipulations, the telegraph company is not liable for mistakes in the transmission or delivery, or for the non-delivery, of an unrepeated message beyond the sum received for sending the same;"

and the Court further says that the decision of the Supreme Court in the case of *Primrose* v. *Telegraph Co.* "silences further contention on these questions in the federal courts."

In *Clement* v. *Western Union,* 137 Mass., 463, the only negligence complained of *was delay in delivery.* With respect to the above stipulation against damages for delay, the Court said:

> "The only negligence shown in this case was the unexplained *delay in delivering* the message on the part of the messenger boy to whom it was, *after its receipt,* entrusted for delivery. It may be that the

company might be guilty of some fraudulent or gross negligence in transmitting or *delivering* a message, so that it would not be protected by its regulation from liability for actual damages, though in excess of the sum stipulated. *But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation, and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount unless it receive a reasonable compensation for assuming further responsibility.*"

In

Birkett v. *Western Union,* 103 Mich., 363, 33 L. R. A., 404,

the damage claimed was caused *solely by delay.* The facts were that "At 10 o'clock plaintiff sent an unrepeated message to the physician." "The message should "have been delivered in about half an hour but was "not delivered until 2 o'clock P. M. . . . *Action "to recover damages for defendant's failure to promptly "deliver a telegram.*"

The Court, after reviewing the authorities, says:

"It is therefore clear that in order to hold this regulation which was a part of the contract, void, we must not only overrule the decision of our own court *but must run counter to the great weight of authority.*"

The Court further says, and this paragraph applies exactly to the facts of the case before the Court, assuming that the message did not reach Wabuska:

> "The question now before us is not one of neglect to transmit at all, nor of failure to deliver after receipt at the place of destination. It is a case of delay in transmission. It is obvious that such delays may occur from various causes. *There is as much reason in stipulating against such delays as there is against inaccuracies in the message. The demand for its repetition is a notice of its importance, and the necessity for promptness, additional to the language of the message itself.*"

The case of

Stone v. *Postal Tel. Co.* (R. I.), 76 Atl., 762,

was an "action by *M. M. Stone & Co.* v. *The Postal Tel. Co.*, for *delay in the delivery of a telegram.*" The Court held the stipulation was valid in respect to delays, saying:

> "We are of the opinion that the regulation set out in this question is a reasonable one. The provision seems primarily intended to limit the liability of the company for mistakes in transmission rather than for delay, *though the rule includes a limitation of the company's liability for delay in transmission.*"

In California the leading cases regarding the validity of the above stipulation are in

Hart v. *Western Union,* 66 Cal., 579;
Coit v. *Western Union,* 130 Cal., 657;
Union Con. Co. v. *W. U.,* 163 Cal., 298.

The first two cases expressly held that the stipulation is valid, whether applying to errors or delays, and that "as to its validity and binding force in this State at least, the law may be considered settled" (130 Cal., 661).

But both of the above cases arose out of errors in transmission and therefore the entire question was reconsidered by the Supreme Court in the Union Construction Co. case where the authorities are again reviewed at great length.

The Court says, page 315:

> "Under these circumstances we may consider whether or not the contract in question should be construed to apply to *delays* in the delivery of a message which has been correctly transmitted,"

and reached the following conclusion concerning the question of delays, page 316:

> "For these reasons it (the stipulation) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message *from the company's desk where it is received from the sender*

to the company's office where it is written out and made ready for delivery to the addressee."

In California the above statement may be taken to be the rule now adopted by our Supreme Court as to delays at an intermediate point. If the delay of the message in suit occurred between Reno and Wabuska, it was a *delay at an intermediate office* and comes within the rule thus laid down. If, on the other hand, the message reached Wabuska, as stated by the witness Collins, the further delay was attributable to the connecting line and the result is the same.

THE STIPULATIONS UNDER CONSIDERATION HERE HAVE BEEN HELD REASONABLE AND VALID BY THE INTERSTATE COMMERCE COMMISSION, WHICH NOW HAS JURISDICTION OVER INTERSTATE TELEGRAPH COMPANIES.

Since the message in suit was transmitted, Congress by amendment to the Interstate Commerce Act, June 18, 1910 (36 Stat. L., 544, Chap. 309), assumed full control of the interstate business of telegraph companies. Said amendment provides that the Act shall apply to such telegraph companies and all charges shall be just and reasonable, and prohibits unlawful discrimination or preference, and provides further, Section 1, as follows:

"that messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classi-

fied into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages" (36 Stat. L., 544, 545).

Said Act further, by Section 315, invested the Interstate Commerce Commission with jurisdiction to determine the *reasonableness of rates, regulations and practices of such companies.* The reasonableness and validity of the stipulations in question here came before the Interstate Commerce Commission in the case of

Cultra v. *Western Union Telegraph Co.*

decided May 17, 1917, and reported in the advance sheets of the Interstate Commerce Commission decisions, 44 I. C. C., p. 679. While, as above stated, the message in question was sent before the amendment to the Act of Congress, yet the stipulations in question in both cases are the same, and if they are reasonable and valid limitations now under the present Act of Congress which expressly approved the classification of messages, they were reasonable and valid at the time the message in suit was sent. We invite the Court's attention to the entire body of the opinion in this case. Portions which are pertinent to the decision here are as follows:

"Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeated message, the

rates for repeated and special value messages being built upon it. The unrepeated rate or charge has always been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeated rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred, through error or delay in the transmission or delivery of the message, to the extent of fifty times the rate charged, with a maximum of $50. For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of 1 per cent. of the amount of the assurance desired, the defendant, within the value so placed upon the message, assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

"The complainants contend that rates, and rules of this kind affecting the rates, that limit the liability of a telegraph company for error in transmission are unreasonable, because it is the duty of

such a carrier, under the charges paid to it, to transmit all messages correctly. This theory assumes that the rate for an unrepeated message must necessarily embrace the obligation to transmit it correctly and to respond in damages for the failure to do so. On that point in *Primrose* v. *Western Union Telegraph Co.*, 154 U. S., 1, 25, it is said:

"'The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery, or in the non-delivery of a message.'"

And again:

"As has been said, the complainants cite many cases in which restrictions upon the liability of this defendant under its several classes of rates have been considered and the restrictions are variously referred to as unjust, unconscionable, without consideration, utterly void, or as being contrary to sound public policy. We are asked by the complainants to announce the latter principle in this case. On the other hand, the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates. We shall not undertake to review any of these cases

here. It will suffice to say that, apart from the federal legislation now under consideration, the complainant's action, if brought in some State courts would apparently meet with success, while if laid in the courts of other States would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. *But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts."*

And again:

"Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority

for this view is found in numerous decisions by the State and federal courts. In *Boyce* v. *Western Union Telegraph Co.,* 89 S. E. (Va.), 106, 108, it is said:

"'. . . Congress, by the act of June 18, 1910, seems to recognize the necessity and validity of such stipulations and to authorize the making of such contracts with respect to repeated and unrepeated messages.

"'. . . So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeated and to charge different rates for each; in other words, to enter into the very contract which was made in this case.'

"See also, to the same effect, *Western Union Telegraph Co.* v. *Dant,* 42 App. D. C., 398; *Western Union Telegraph Co.* v. *Bank of Spencer,* 156 Pac. (Okla.), 1175, 1179; and *Haskell Implement & S. Co.* v. *Postal Telegraph-Cable Co.,* 96 Atl. (Me.), 219, 223."

THE SUBJECT OF THE MEASURE OF DAMAGES.

If there is any liability in this case, the measure of damage would seem to be the difference between the amount of the payment to Pitt and Campbell and the value of the stock at that time. There is no allegation in the complaint that the stock was of no value; there is no allegation that it was not worth the price agreed upon. If the stock had been selling on the market for $75,000, the price named in the contract, the plaintiffs would not have been damaged

by the payment of the draft. We respectfully urge therefore that the Court erred in not sustaining the demurrer upon this ground.

It is certain, however, that the amount of damage sustained by the plaintiffs, if any, is a matter which had to be determined by the evidence in the case and after a consideration of the above facts therefore, the amount could not be said to draw interest.

SUMMARIZING.

We respectfully contend:

1st. The contract between Lange and Hastings and Pitt and Campbell was not an option but was an absolute agreement to buy the stock, and that the forfeiture clause at the end of the agreement was intended to provide an additional remedy for the benefit of the vendors.

2nd. The provision in the contract that "thereupon" the rights of the parties should cease and determine, relates not to the default of purchasers, but to the *return of the stock which the evidence does not show was ever returned.*

3rd. That if the contract could be construed to be an option, it was a continuing option or offer to sell, which was accepted when the plaintiffs mailed the bank draft prior to the filing of the telegram, with the instructions to apply it on the agreement.

4th. The message was sent subject to the terms and conditions of a written contract agreed to by the parties and which is valid.

5th. The alleged *oral contract of insurance was in conflict with the written agreement* under which the message was sent.

6th. The judgment should not be for more than the amount received for sending the message, nor in any case beyond fifty times the sum received for sending the same.

Respectfully submitted.

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No. 3007.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

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vs.
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vs.
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Brief for Plaintiffs in Error William Lange, Jr. and J. U. Hastings.

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STATEMENT OF THE CASE.

This case is before the Court on writs of error sued out by each of the parties to the action, who are

herein referred to, respectively, by their original designations. Judgment was rendered below in favor of plaintiffs for the principal amount of their demand, to-wit, $11,250.00, and they now seek to correct the action of the Court in refusing to include in the judgment interest thereon.

The action was brought to recover a loss suffered by plaintiffs through defendant's delay for three days in the transmission and delivery of a telegram sent by plaintiffs from Oakland, California, addressed to the Lyon County Bank at Yerington, Nevada. Said telegram was sent under a *special contract* by which defendant, *for an extra toll, insured its immediate transmission and delivery.* By it plaintiffs sought to intercept and prevent the payment of a draft in the sum of $11,250, which had been previously mailed by them to said bank for the purpose of meeting the second of certain seven installment payments under a contract then in force between themselves and Messrs. Pitt and Campbell. [Findings VII, VIII, Tr. pp. 47-52.] That contract provided for the deposit in escrow with said bank of the mining stock which was the subject-matter thereof, and contained the following clause:

"Third: And it is further agreed *that in the event of default* by said parties of the second part [the plaintiffs herein] in making any of the payments herein provided for, said *Lyon County Bank shall be authorized under the terms of such deposit in escrow, and it is hereby authorized,* to deliver all of the shares of stock so deposited with it pursuant hereto to said parties of the first part [Pitt and Campbell], *and that all payments theretofore made* by said parties of the

second part *shall be forfeited* to said parties of the first part, *and that thereupon all rights* of *each* of the said parties hereunder *shall forever cease and determine.*" [Finding IV, Tr. pp. 45-46.]

The lower Court, in overruling the demurrer to the complaint, held that this contract did not constitute an absolute contract of sale, but was one permitting the plaintiffs to withdraw therefrom by defaulting in any one payment and thereby rendering the contract no longer obligatory upon either of the parties. Judge Van Fleet, in the course of the oral opinion delivered at that time, said:

"I am satisfied that the contract out of which the controversy grows, while couched in terms which would *otherwise* give it the effect of an *absolute contract of sale* of the mining stock in question, *in view of the character of the forfeiture clause, cannot be given that construction.* That clause is *too definite and explicit* to leave any room for construction, or for the application of the general principle that ordinarily a forfeiture clause is for the benefit of the obligee and not the obligor. *In this instance the terms of the forfeiture clause are such that it would be a violation of the plain and obvious meaning of its language to hold that it did not apply to both parties to the contract;* that upon a failure, in other words, of the making of the future payments or any one of them therein provided the contract became at an end as to both parties and *no longer obligatory upon either. Of course, there is no reason why individuals are not to have the right to so contract, if they see fit.* In this instance I think they have

so contracted and that the general rule as applied in the case of Wilcoxson v. Stitt, 65 Cal. 596, and cases there referred to, cannot be held to apply to the more specific language of this clause."

The correctness of this construction of the Pitt and Campbell contract cannot, we believe, be successfully controverted.

Specifications of Error Relied Upon.

Plaintiffs have assigned as error [Tr. pp. 182-183] the failure of the lower Court to include, in the judgment rendered in their favor, *interest* on the amount of their claim either (a) from the date of its presentment to defendant (June 26th, 1907) or (b) from the date of the commencement of this action (April 28th, 1909).

BRIEF OF THE ARGUMENT.

Points of Law and Fact.

The points here made are:

1. That plaintiffs' claim was a *liquidated demand* arising on *contract;* that the value of the mining stock does not at all enter into the determination of the amount thereof; and hence that they are entitled to interest either from the date at which they presented their claim to defendant or from the commencement of this action.

2. That defendant, by proper investigation, *could have ascertained* that the mining stock was valueless, and therefore that the *amount* of plaintiffs' claim *was*

justly due, even if (contrary to our contention) such value be an element in fixing their loss; and that in such a case section 3287 of the Civil Code of California does not preclude the allowance of interest.

3. That defendant *repudiated all liability* on plaintiffs' claim and did not merely dispute the *amount* of an admitted liability; and that this course,—particularly in the face of plaintiffs' demand being for the *precise sum awarded them by the judgment* herein,—renders inapplicable the rule that an unliquidated claim does not bear interest until judgment, even were it possible (which we deny) to regard plaintiffs' demand as unliquidated.

4. That defendant, for an extra compensation, *insured* the immediate transmission and delivery of the delayed message; that this constituted a contract to pay plaintiffs, as indemnity, the amount of the draft, on a day certain, in the event that the message was delayed; and that one of the *implied* terms of such an agreement is the *obligation* on the insurer's part *to pay interest as damages* for its failure so to indemnify, whether the loss by such delay was or was not a liquidated sum.

I.

Plaintiffs' Was a Liquidated Demand for Breach of Contract; the Value of the Mining Stock Does Not Enter Into the Determination of the Amount Thereof; and Hence They Are Entitled to Interest.

Under the Pitt and Campbell contract, as construed by the lower Court, plaintiffs had the right at any time to avoid all further liability by defaulting in the payment of any one of the installments therein provided for. By so doing, they might cause "forever to cease and determine"—not only their own rights,—but also the reciprocal rights of Pitt and Campbell, and hence, of course, the correlative liability of themselves. Their telegram was sent pursuant to their election so to terminate the contract. Therefore, their loss, due to the failure of defendant to transmit to the bank their telegraphic instructions not to pay the draft originally designed by them for application on the Pitt and Campbell contract, is measured by *the amount of money which was paid contrary to their desire;* and no other element whatever enters into the determination of the amount of that loss. This is not a case wherein plaintiffs, having paid for and received an article not having an ascertainable value, sue for the difference between its value and the price paid as a result of defendant's failure to intercept their remittance. Such a state of facts would, of course, present a typical case of an unliquidated demand. On the contrary, *plaintiffs received nothing* under the Pitt and Campbell contract. When they determined to withdraw therefrom, they

had made an initial cash payment of $7,500 and had forwarded the draft in question to meet the second of the seven installments. On discovering that the mining stock was valueless, they endeavored to prevent the payment of that installment and thus to confine their loss to the original cash payment. This they were entitled to do, and for that purpose they contracted with defendant *immediately* to transmit and deliver their telegram,—*defendant* INSURING *such immediate transmission and delivery for an extra compensation.* [Findings X and XII, Tr. pp. 52-53, 56.] Defendant negligently delayed the transmission of the message for three days, with the result that defendant's loss on the Pitt and Campbell contract, instead of being restricted to $7,500, was increased by the amount of the draft, that is, to $18,750. Plaintiffs, of course, made no further payment under that contract. They forfeited the $18,750 [Findings XVII, Tr. p. 60; p. 103] and the Lyon County Bank, pursuant to the terms of the contract, was required to return the stock to Pitt and Campbell.

It is apparent, therefore, that the actual value of the Pitt and Campbell stock does not enter into the question of the determination of plaintiffs' loss. *They were not entitled to the stock unless they elected to make, and did make, full payment.* They were at liberty at any time to elect not to take the stock by failing to make further payment, and their withdrawal from the contract might be for any reason which to them seemed sufficient.

The Court found the stock to be in fact valueless. [Findings XVIII, Tr. p. 60.] But suppose the fact

were otherwise,—would plaintiffs' loss, by reason of defendant's failure to transmit and deliver the telegram in due season, have been reduced one cent? An answer in the affirmative would presuppose that plaintiffs received the stock under their contract,—which is contrary both to the fact and to the terms of the agreement.

Plaintiffs sought by their telegram,—not to take a step by which would be fixed only one of the terms of an equation for determining their loss,—but to put an end to further responsibility by defaulting in payment and thereby forfeiting $7,500 before the payment of their draft would increase the forfeiture they were bound to suffer to $18,750. Their loss was the amount of the draft,—not that amount less some other figure, definite or indefinite,—and it was so expressly found by the lower Court. [Finding XX, Tr. p. 61.] Eliminating the initial payment to Pitt and Campbell, the only inquiry necessary or permissible in order to determine the detriment to which they were subjected by "defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed" [Finding XX, Tr. p. 61] is,—"What would have been plaintiff's loss if defendant had faithfully performed its contract for the immediate transmission and delivery of the telegram?" Plainly the answer is,—"There would have been *no* loss." The value of the mining stock is a wholly false quantity in the case. It was touched upon at the trial, but it has no legitimate place herein except as bearing upon the quality of the information on which plaintiffs acted in withdrawing from the Pitt and

Campbell contract and upon their good faith in so doing.

As plaintiffs were entitled to recover damages *certain in amount,* and as the right to the recovery thereof was vested in them at least as early as the date of the filing of their claim with defendant (June 26th, 1907), it follows that the lower Court should have included interest thereon in the judgment given in plaintiffs' favor. (Civil Code, Sec. 3287.)

We regret that we are unable to present to the Court in this connection any authority, precisely in point, illustrative of our contention. Search for such an authority has been in vain, and we can only surmise that our failure in this regard may be due to the fact that, by common understanding in the profession, such a demand as that here in question is conceded to be liquidated.

II.

Defendant, by Proper Investigation, Could Have Ascertained That the Mining Stock Was Valueless, and, Therefore, That the Amount of Plaintiffs' Claim Was Justly Due, Even if (Contrary to Our Contention) Such Value Be an Element in Fixing Their Loss; and, in Such a Case, Section 3287 of the Civil Code Does Not Preclude the Allowance of Interest.

Plaintiffs' claim for damages was filed with defendant on June 26th, 1907, some fifty-eight days after the delayed message was sent, and in that claim they stated *truly and correctly* the amount of their loss and all of

the facts out of which it arose. [Finding XIX, Tr. p. 60.] No investigation of those facts was made by defendant for a very considerable period. As counsel for defendant stated at the trial, the claim "lay dormant for a year or two." [Tr. p. 130.] Testimony by defendant's claims agent that he had made a report on this claim almost two years after it was filed, awoke evident surprise in the learned judge who presided at the trial, which lead to this colloquy:

"The Court: Can you explain why claims of this kind are permitted to run for years before they are taken up for investigation?

Mr. Hodghead: As a matter of fact, this investigation was delayed for a while after the claim was made." [Tr. p. 131.]

This is a bare statement of the fact,—not the explanation called for by the court,—and the significant feature of it is that the delay is in no wise connected with the difficulty or impossibility of ascertaining the value of the stock, or with any effort looking to such ascertainment. Defendant was "afforded every facility" by plaintiffs "to investigate this claim" [Tr. p. 130], but there is not one iota of evidence that any appraisal of the stock was ever secured. In fact, the possibility of escaping the consequences of their gross negligence by showing that the stock was of more value than the sum that remained unpaid thereon under the Pitt and Campbell contract was wholly an afterthought,—so much so that at the trial, counsel was quite unprepared with testimony upon the subject. [Tr. p. 155.] Under these circumstances, can it be said that the rule enun-

ciated in section 3287 of the Civil Code forbids the allowance of interest? We are confident that said section never was intended to apply (so as to preclude the granting of interest), to any case wherein the determination of the amount of liability *is not inherently impossible* without a judicial investigation, especially if the party in default *makes no effort to fix that amount by proper inquiry* as to values, cost, etc.

While we are by no means driven to the necessity of establishing this proposition in the present case, nevertheless the genesis of the code section in question, taken in connection with the authorities in jurisdictions wherein the rule has not been adopted by legislative enactment, indicates that said section was not intended as a departure from the law on this subject, as theretofore declared generally by the courts of this country, and that that law was and is in consonance with the proposition here advanced. Section 3287 is taken *verbatim* from section 1835 of the Field draft of the proposed New York Civil Code. The note appended thereto by the Field Commission was copied by the California Commissioners, and is, in part, as follows:

> "This seems to be the rule in actions for wrongful injuries * * * as it clearly is in actions upon contract. (Dana v. Fiedler, 12 N. Y. 40; Van Rensselaer v. Jewett, 2 N. Y. 136); * * *."

It is significant that in the second case cited by the Commissioners, it was held that interest was recoverable, as a matter of law, upon the rental there sued for, although it was payable in wheat and services the value of which was *unliquidated* by the contract. The court there said:

"Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; *and a just indemnity,* though it may sometimes be more, *can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default* until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in *all* such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained *by an inquiry concerning the value* of the property and services. *But the value can be ascertained;* and when that has been done, *the creditor,* as a question of principle, *is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money.*"

2 N. Y. 140.

The courts of New York have never departed from the rule as enunciated in this case on which the code section in question was actually and avowedly based. Thus, in McCollum v. Seward, 62 N. Y. 316, it is said:

"The allowance of interest on the plaintiff's claim from the time of the commencement of the suit *although the amount was then unliquidated,* was proper within the recent authorities upon the subject." (Citing cases.)

62 N. Y. 318.

In Schmitt Bros. v. Boston Insurance Co., 81 N. Y. Supp. 767, interest was allowed on the amount of the recovery under an insurance policy payable sixty days after proof of loss. The court, after pointing out that, for all practical purposes, there was a total loss of plaintiff's property,—the value of which was in excess of the sum for which it was insured,—said:

> "*An honest appraisement would have at once disclosed this fact;* consequently, the defendant became obligated to pay at the expiration of the sixty days the sum secured to be paid by the policy. Such sum was demanded, and payment was refused. * * * As the extent of the amount which the defendant was required to pay *was easily ascertainable,* it must so far be regarded as a *liquidated* sum that, upon demand of payment when payable, interest was set running."
>
> 81 N. Y. Supp. 770.

In Braas v. Village of Springville, 91 N. Y. Supp. 599, plaintiff sued on a *quantum meruit* for the value of certain services. The whole evidence as to the value of the services *was directed to the payment of a specified sum* which the referee found was due at the commencement of the action. The court held that the plaintiff was entitled to interest, despite the fact that the sum had not been agreed upon between the parties and the amount actually determined satisfactorily between them. The court apparently took the position that the claim was a liquidated one because, at the trial, the prices named in an express contract for doing similar work, were adopted as the value of the labor and material for which recovery was sought in *quantum meruit.*

See also:

Loomis v. Gillett, 75 Conn. 298, 53 Atl. 581.

The case of New York etc. R. Co. v. Ansonia Land and Water Co., 72 Conn. 703, 46 Atl. 157, is illustrative of our proposition respecting the inapplicability of section 3287 of the Civil Code to cases in which, by due inquiry, values, cost, etc., etc., could be fixed and the amount of the liability of the party in default be by him ascertained. There action was brought by the railroad company for damages suffered by it through the washing out of its road-bed owing to defendant's negligence. The defendant denied *all* liability. The damages awarded included the cost of repairs, the expense incurred in the transportation of passengers and mail around the washout, and interest upon the cost of repairs from the several periods at which plaintiff was put to such cost. In sustaining the award of interest, the court, *per* Baldwin, J., said:

> "There is certainly an obligation to make payment, a breach of which places him in default, whenever he has knowledge *or means of knowledge* as to what amount is justly and reasonably due. In the case at bar the defendant had, from the first, the means of ascertaining what the repairs of the plaintiff's roadway would cost. * * * If it be the natural consequence of the injurious act, and, as in this case, its amount *could reasonably be ascertained by due inquiry and investigation, then,* whatever may be true under other circumstances, *the wrongdoer who neglects to ascertain it ought, in fairness, if it becomes necessary to sue for compensation, to be made to pay,* not only what was thus originally

> due, but also *damages for his delay in not paying it without judicial compulsion.* * * * Any civil engineer or railroad builder could have readily stated the approximate cost, and there is no claim that the precise outlay could not have been learned on inquiry from the plaintiff."
>
> 46 Atl. 157-158.

On the facts above set forth, it is evident that defendant, although promptly advised of all of the circumstances out of which arose plaintiffs' claim for damages, and although furnished "every facility" for investigation, wholly negected to make any proper effort to determine the value of the mining stock in question. The duty to make all possible inquiry in this regard was incumbent upon it,—the more so in view of its undertaking, for an *extra compensation,* to *insure* the immediate transmission and delivery of plaintiffs' message. The stipulation on the back of its message blank requiring claims for damages to be filed within sixty days, can only be sustained as a reasonable regulation on the theory that defendant, with its large and complicated operations, must be accorded an early opportunity to investigate, and determine the truth or falsity of, each claim; and this in turn imposes the duty on the defendant to avail itself of that opportunity or to suffer the consequences of its failure so to do. The authorities cited under this head of our argument amply sustain the proposition that, on the failure of defendant to investigate and ascertain the amount of plaintiffs' loss, it is chargeable with interest when it develops, on rendition of the judgment,

that plaintiffs claimed no more than was their just due.

III.

Even if Plaintiffs' Demand Could Possibly Be Regarded as Unliquidated (Which We Deny), Defendant's Repudiation of All Liability for Its Breach of Contract, in the Face of Plaintiffs' Claim for the Precise Sum Awarded Them by the Judgment Herein, Renders Inapplicable the Rule Disallowing Interest.

The rule denying interest in the case of unliquidated demands has been viewed, progressively, with less and less favor by the courts. In Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 Atl. 134, the court says:

> "The purpose sought in awarding damages other than vindictive is to make a fair compensation to one who has suffered an injury. * * * Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one *well calculated to defeat that purpose in many cases,* and that *no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages.* * * * There are actions to which the suggested rule is applicable. * * * Others, however, present conditions where without an allowance for interest, although the demand may be *unliquidated,* fair compensation for the injury done would not be accorded and justice thus denied. The determination of whether or no interest is to be recognized as a proper element of damage is one to be made in view of the de-

mands of justice rather than through the application of any arbitrary rule."

65 Atl. 137.

This passage is quoted with approval in 1 Sedgwick on Damages (9th Ed.), Sec. 315.

A similar attitude is displayed by the federal courts. In Southern Pacific Co. v. Arnett, 126 Fed. 75, the action was to recover a wholly unliquidated claim for breach of a contract to transport livestock with reasonable care. The court there said:

"Nothing less than the actual amount of the loss and interest thereon from the time it was demanded will fully compensate the shipper for the breach of the agreement, and he is entitled to full compensation. *The general rule is that the plaintiff is entitled to interest upon the damages which he sustains from a breach of a contract* and this case falls fairly within that rule."

126 Fed. 80.

In the case of Nashua etc. R. Corp. v. Boston etc. R. Corp., 61 Fed. 237, the Circuit Court of Appeals for the First Circuit considers at length the question of the allowance of interest in a suit for an accounting upon a joint traffic contract of the two railroads. The bill had been originally dismissed by the Circuit Court, but this decree was reversed by the Supreme Court, a portion of the claim made by the bill being disallowed and a portion allowed. The case was then sent to a master to take and state the account to which the complainant was entitled. The account being duly taken, the complainant claimed interest, either from

the dates when the various amounts were received by the respondent, or from the date of the filing of the bill; but interest was disallowed. The Circuit Court of Appeals modified the decree of the lower court by including interest from the date of the filing of the bill, and in so doing discussed at length (pages 246 to 252) the American and English authorities upon the question. The answer admitted that the sums in dispute had been received and alleged that the question was not about *amounts,* but merely as to the *right* to the sums named. It would be impossible to give any adequate extract from the very learned discussion of the authorities in this case, which, at the pages indicated, we particularly commend to this court's attention. The court, however, concludes its examination of the federal authorities as follows:

> "It will therefore appear that in all the cases which we have been able to find in the Supreme Court, within a period sufficiently late to be supposed to be in harmony with modern views touching the law of interest, interest has been uniformly allowed, with only three exceptions, the nature of which we will hereafter refer to. The latest case is Sturm v. Boker, 150 U. S. 312. * * *"

After pointing out that, in the case cited in the passage above quoted, the Supreme Court had applied "the broad equity that the prevailing party should recover interest from that date [of filing the bill] on whatever might be found due him," and that in this particular it had "reverted to the fundamental principles of justice

stated by it in the equity suit of Curtis v. Innerarity, 6 How. 146, the opinion proceeds as follows:

> "* * * Indeed, in the United States the active use of money is so general, the holding of it as a special deposit, so that there is no increment, is so rare, that to refuse a plaintiff or complainant interest on money unjustly detained does, ordinarily, a double injury,—it deprives him of the increase to which he was justly entitled, and it violates, in behalf of the defendant, a fundamental maxim of equity, by allowing him to take advantage of his own wrong."
>
> 61 Fed. 250-251.

It is to be noted in this case that the court gave interest only from the date of the filing of the bill, simply because prior to that time there had been no sufficiently specific demand to start the running of interest.

In Consaul v. Cummings, 222 U. S. 262 (likewise a bill for an accounting), the court cited and followed Nashua etc. R. R. Corp. v. Boston etc. R. R. Corp., *supra,* although what was due was uncertain,—only being ascertainable after numerous references in order to properly state the account,—and was not liquidated until the final decree. The court there said:

> "Interest is allowed by way of damages for failure to pay money when it is due, and frequently is not allowed except from the time the amount to be paid has been definitely ascertained. But there are many cases in which interest is charged from a prior date. Here the defendant at first promised to make a statement, then contended, without substantial support, that the part-

> nership was dissolved because Edmonds had transferred his interest in the fees. He resisted the accounting, failed to produce books, vouchers and statements proper to be kept by a surviving partner. As the Court of Appeals said, the delay and difficulty in reaching a conclusion was largely due to his failure to keep proper books. Under the circumstances the master properly allowed interest from the date the bill was filed."
>
> *222* U. S. *272-273.*

This case is particularly in point, as sustaining our proposition that peculiar circumstances in the situation and attitude of the person from whom a claim is due, sometimes render inapplicable the rule disallowing interest on unliquidated demands. See, also, in this connection, Spalding v. Mason, 161 U. S. 375, 395.

In California, we have an express statutory enactment which, to a certain extent, puts the matter beyond the reach of judicial construction. By section 3287 of the Civil Code, it is provided:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, * * *."

But even in California doubt has been expressed whether interest should *always* be disallowed on unliquidated demands. Thus in Cox v. McLaughlin, 76 Cal. 60, the court says:

> "*We are not prepared to say,* in general terms, *that no interest in any case can be recovered in*

> *an action upon contract for an unliquidated demand.* * * * in this state interest is allowable on such demand *under some circumstances.*"
>
> 76 Cal. 71.

In Mix v. Miller, 57 Cal. 356, it was held that, under section 3287 of the Civil Code, a plaintiff was entitled to interest in an action to recover the *reasonable value* of services for making a search and abstract of title, and for money expended for traveling expenses, stationery, board and assistants, from the day that his demand became due,—that is to say, from the date of the completion of the work. This was plainly an unliquidated demand, yet interest was allowed, the court citing section 3287 of the Civil Code. This case was cited in Cox v. McLaughlin, *supra,* in connection with the passage above quoted.

If construed as denying interest in every case of a demand not strictly liquidated, the rule laid down in section 3287 of the Civil Code would be an extremely harsh one, as is indicated in the passage above quoted from Bernhard v. Rochester German Insurance Co., 79 Conn. 388, 65 Atl. 134. Moreover, a rule disallowing interest in all such cases places a premium on the recalcitrancy of the person from whom the claim is due.

The basis for the rule is thus indicated in Cox v. McLaughlin, *supra:*

> "The reason of such denial of interest is said to be that the person liable *does not know what sum he owes, and therefore can be in no default* for not paying."
>
> 76 Cal. 67.

"When the reason of a rule ceases, so should the rule itself." (Civil Code, Sec. 3510.) Where the debtor's failure to settle is, *in truth and in fact,* based upon his inability to determine the *amount* justly due from him, and he shows this to be so by an effort to adjust that amount as between himself and the claimant, the rule denying interest,—so long as it remains upon the statute books,—should be applied. He then is not in default because, while admitting a liability, "he does not know what sum he owes." But where the person upon whom the claim is made, instead of admitting responsibility and discussing the amount of loss, *denies* all responsibility, the reason for the ruling does not exist. He takes it upon himself *to decide that he owes nothing.* He assumes to *know.* He is not withheld from making a tender because he cannot determine the *amount* of his liability. On the contrary, he denies *all* responsibility and is determined to resist any payment whatever. Should *he* be shown the tender regard accorded to the man who admits a just liability, but who honestly differs from the claimant as to the amount thereof? If so, not only does the claimant suffer by being deprived during the period of litigation, without compensation, of the use of the money justly due him, but a *direct inducement* is offered every person from whom a demand is owing *to abstain from adjusting and paying the amount thereof,* in order that he may have the use, during that period, of the money which he must ultimately pay. Such a holding would be subversive of the policy of the law to encourage the private settlement of differences. At the time of

judgment, he will, by its terms, be required to pay no more than, in fair dealing, he should have paid at the time the claim arose,—perhaps years before.

This circumstance was pointed out forcibly in the dissenting opinion of O'Brien, J., in the case of Gray v. Central Railroad Co., 157 N. Y. 483, where he says:

> "The defendant has had the use of the money which it was bound to pay to the plaintiffs in satisfaction of the contract for nearly thirty years, and at the end of this long period it has been held that it is not bound to pay the plaintiffs any more than at the day of the breach. The ancient rule, long since repudiated, that interest cannot be allowed upon unliquidated demands, when applied to a case like this, *simply sets a premium on injustice. It encourages litigation,* since the party in default upon his contract may *always* contest the claim *without any liability to have it increased* by the lapse of time, and all this upon the *pretense that there was no way in which he could find out how much he ought to pay* his neighbor for a violation of his contract."
>
> 157 N. Y. 492.

Particularly apparent is the absence of the reason for the rule disallowing interest when defendant denies all liability *and* the award that is by the judgment made to the claimant, is *precisely the sum by him named in his demand.* Then, surely, the defendant is in no position to plead his ignorance of the amount due him in order to escape liability. The event proves the demand to have been a just one which he should have paid, but which he refused to pay either in whole or in part.

He who denies a liability *in toto* puts himself in default if, by the judgment, it be proven that in law the liability existed and that it was for an amount accurately measured by the demand; and he should not be permitted to assume a dual role by first *repudiating* responsibility, and, when that responsibility is fastened on him, by then claiming exemption from the payment of interest on the ground that he could not be in default *since he did not know what sum he owed.* In 1 Sedgwick on Damages (9th Ed.), Sec. 314, it is said:

> "In some cases it has been held that interest runs from the time the plaintiff demanded a settlement, i. e., when the demand is reasonable and puts the defendant in default. Thus in Pennsylvania, in Gray v. Van Amringe [2 W. & S. 128], the court held a demand sufficient to entitle the plaintiff to interest. The action was for services rendered. An account had been presented but payment had been refused, on the ground that the charges were excessive. The plaintiff recovered the full amount demanded. In delivering the opinion of the court, Kennedy, J., said: 'In a case, therefore, where the plaintiff has performed work, labor, and services of any kind, * * * and after having performed the same, *demands of the defendant what shall be deemed afterwards, by a court and jury, a reasonable compensation, which the latter refuses to pay,* it would seem to be just that the plaintiff should recover interest on the amount so demanded, from the time of the demand.'
>
> "A demand, not for an accounting and agreement on the amount due, but a sum as-

> sumed by the plaintiff to be due, is sometimes said to be enough to put the defendant in default if the sum is a reasonable one. So where an attorney presents a bill for his services, the charges being found to have been reasonable, interest is allowed from the presentment of the bill. *This may be supported, upon the ground that it is really a proper demand for a settlement.*"

The amount awarded plaintiffs herein was the identical sum claimed by them in their written demand on defendant, which demand—so far as regards any action looking to its settlement in whole or in part,—was totally ignored by defendant. Where there is a duty incumbent upon the person liable, to liquidate a claim, his repudiation of liability and his refusal to liquidate entitle the claimant to interest from the date of such repudiation and refusal. Thus in Bernard v. Rochester German Insurance Company, 79 Conn. 388, 65 Atl. 134, it was held proper to include interest upon the amounts which the policies of insurance in suit obligated the defendant to pay, from the time it refused recognition of any liability and put an end to the prescribed process of adjustment,—the court saying:

> "* * * by such inclusion only could the court compensate the plaintiff for what he had suffered by reason of the delay resulting from the defendant's wrongful act."
>
> 65 Atl. 137.

And note the passage from this opinion quoted at the beginning of subdivision "III" of this brief.

See, generally, 1 Sedgwick on Damages (9th Ed.), Secs. 312-315.

In White v. Miller, 78 N. Y. 393, the court said:

> "* * * where an account for services, or for goods sold and delivered, which has become due and is payable in money, *although not strictly liquidated,* is presented to the debtor and payment demanded, *the debtor is put in default and interest is set running;* * * *."
>
> 78 N. Y. 399.

Again, in City of Louisville v. Henderson's Trustee, 13 S. W. 111 (Ky.), it is said:

> *"The judgment allowing the entire claim* establishes the fact that the city *has been a delinquent debtor.* The creditor has been kept out of his money. The city has had the use and benefit of the work and improvement, and, while it may not have intended to harass its creditor by vexatious defense to the suit, yet *interest is given to compensate the creditor,* and not to punish the debtor; and, when it denied the quantity of work done under a contract fixing the time of payment, and the price, *it took the risk of the issue thus made by it being determined against it.* If, in such a case, a creditor, after the lapse of years of litigation, is not entitled to interest, then he will, in effect, lose a part of his debt. He would be kept out of the use of his money; the debtor, in the meantime, getting the benefit of it. The latter would, in effect, pay but a part of his debt. * * * Indeed, he might unjustly thus delay payment until the use of the money would equal the entire debt, and thus, in effect, be out nothing. Even if the amount be in dispute, yet, if it be

finally determined that the defendant in fact owed it, and that it ought to have been paid at a particular time, he cannot complain, with good grace, if he be made to pay interest, because he has had the use of money to which his creditor was entitled. Thus, it will hardly be contended that, if a policy of insurance be payable 60 days after proof of loss, the insured would not be entitled to interest from that time, although the amount of the loss might be disputed, and therefore not definitely known for years, *if the claim were finally made good by judgment.*"

13 S. W. 112.

See also:

Schmidt v. Louisville etc. Ry. Co., 95 Ky. 289, 26 S. W. 547.

The case of Western Union Telegraph Co. v. Carver, 15 Tex. Civ App. 547, 39 S. W. 1021, is particularly in point because it upholds the allowance of interest on damages suffered by reason of the failure of the telegraph company to deliver a message. Damage in the principal sum of $1,000 was found by the jury,—the measure thereof being the difference between the prices in the message offered for certain cattle and the prices at which the same could have been purchased at the date when it was learned by the sender of the message that it had not been delivered. The court there said:

"Here the jury found that at the date of the institution of the suit the defendant should have paid to the plaintiff the sum of $1,000. After that time, at least, *in violation of its duty,* it withheld

> that amount of money from the appellee. By way of indemnity to the latter on account of the detention of his money, it would seem that legal interest should be allowed."
>
> 39 S. W. 1022.

In the recent case of Fairchild v. Bay Point etc. Ry. Co., 22 Cal. App. 328, the court goes farther than is required in the case at bar. The contract there sued on provided that certain work should be compensated for by reimbursing to plaintiffs its cost and adding ten per cent thereto. Respecting interest on the demand, the court said:

> "Nor would the fact that the defendant *denied the amount* of the cost charged against it, *if the court found against defendant's contention,* deprive the plaintiff of the right to recover interest."
>
> 22 Cal. App. 331.

We submit, therefore, that the rule denying interest on unliquidated demands has no application to cases in which, before action brought, defendant makes no question respecting the *amount* of the demand, but on the contrary *denies all liability.* And this is particularly true when the amount specified by the claimant is, by the judgment, declared to have been justly due at the time demand was made. In the case at bar, the inquiries then become pertinent,—"What was defendant's attitude toward the demand here in question? What treatment did it accord plaintiffs' claim for damages? Did it deny *all* responsibility, or did it merely dispute the *amount* of an admitted liability?"

A. *Facts indicative of defendant's denial of all responsibility as a matter of law.*

The message sent by plaintiffs was not an ordinary message. It was a message which on its face showed its importance and the need for haste. [Finding VIII, Tr. p. 49.] In addition, plaintiffs fully explained to defendant's agent, at the time of sending it, all of the circumstances and the necessity for promptness. They placed themselves wholly in defendant's hands with respect to the method in which said message should be sent, and adopted the method of transmission suggested to them by defendant. [Findings VIII and XII, Tr. pp. 49-52, 56; pp. 97-98.] They paid an *extra sum* beyond the ordinary tolls for such a message, to secure, and to have *insured* to them by defendant, the immediate transmission and delivery which they sought. [Finding X, Tr. pp. 52-53.] They made repeated inquiries, after the message was sent, whether it had been delivered promptly, and they were assured that it had "gone out on time but had not been repeated." [Tr. pp. 82, 106.] They made their claim for loss upon defendant on June 26th, 1907, within sixty days as required by the stipulation on the back of the message blank, and in that claim they stated the amount of loss and all of the facts out of which it arose. [Finding XIX, Tr. p. 60.] No attention was paid thereto until February 26, 1909, and then nothing was done except that the defendant's agent attempted to demonstrate to plaintiffs' attorney that the message had not gone to Tonopah or Goldfield, as he had been previously advised. [Tr. pp. 96, 108, 126-

127.] In other words, defendant sought to justify itself. Defendant had not in its possession, at that or any other time, the Wabuska relay of the message (Wabuska being the terminus of defendant's line for Yerington messages),—a circumstance conclusive, not only of the *fact* that the message had not been transmitted by defendant to such terminus either on the night of April 29th or the morning of April 30th, but also of its *knowledge* of that fact. [Tr. pp. 127-129; Finding XV, Tr. p. 58.] And yet, despite these circumstances, showing both that defendant was liable for its failure to transmit and deliver the message and that it must have been aware of its liability, plaintiffs never received word of any action on their claim. Defendant did not *admit* a liability and then attempt to adjust the *amount of loss* which plaintiffs had suffered. In its answer herein, it repudiated all responsibility (1) by denying any special contract with, or the payment of an extra toll by, plaintiffs, (2) by taking refuge behind the stipulations on the message blank, and (3) by endeavoring to shift responsibility to the connecting telephone company. [Tr. pp. 29-32, 34-35, 36.]

And all this in the face of its effort to have plaintiffs authorize the application of the extra telegraph tolls paid by them, to the tracing of the delayed message [Tr. pp. 82, 106], with a plain purpose to evade a responsibility that had already fastened upon it. Never did defendant, by a single act or word, admit responsibility for *any* loss suffered by plaintiffs and thereupon take the position that the loss, though suffered,

was less in amount than plaintiffs' claim. In litigation arising out of the failure of telegraph companies to perform the service for which they were employed, it is usual to find the tender by defendant in its answer of the amount of tolls paid by the sender of the message. No such tender was made in the pleadings here, defendant's position throughout being that it had done everything for which it had been paid. [Answer, Tr. pp. 24-41.]

In other words, the defendant denied all responsibility to the plaintiffs, in the face of their demand (which contained a statement of all the information in their possession bearing upon the controversy), and notwithstanding their effort to aid defendant to supplement that information, by addressing a letter to all persons likely to be able to throw any light on the matter, asking them to assist its investigation. [Tr. pp. 107-108.] Mr. Harrington, defendant's claims agent, testified: "I was afforded every facility by Mr. Poorman to investigate this claim." [Tr. p. 130.] Values and the amount of plaintiffs' loss never were discussed between the parties. Defendant stood flat-footedly upon the proposition that it was under *no* responsibility, and at the trial introduced no evidence of values but only the testimony of one of the owners of the stock that, *in his opinion,* the same was more valuable than the amount that remained payable under the Pitt and Campbell contract after the application of the draft thereon. The court found, contrary to this opinion evidence, that the stock was practically valueless. [Finding XVIII, Tr. p. 60.]

The record, we submit, demonstrates that this is a case,—not where defendant was in ignorance, as a matter of *fact,* of the *quantum* of its liability,—but where defendant, as a matter of *law,* denied *all* responsibility. Ignorance of the law is no excuse; and when defendant seeks to justify itself *in point of law alone,* it hardly lies in its mouth to claim an exemption from the payment of interest upon the ground that the demand, being unliquidated in point of *fact,* defendant could not know what sum it owed plaintiffs.

And as for its investigation, on which must have rested the denial of its legal responsibility, what is to be said of defendant's failure to make inquiry at Tonopah and Goldfield when advised by plaintiff's counsel that the Oakland operator had told him the message had been erroneously sent to one or the other of those two points? [Tr. pp. 126-127, 130-131, 106-107.] Is not this indicative either of inexcusabe neglect by defendant *to avail itself of an avenue of information* that would probably have settled (even to its own conviction) its legal responsibility, or else of a recalcitrant spirit *determined on resistance of any demand, however just?*

IV.

Defendant, for an Extra Compensation, Insured the Immediate Transmission and Delivery of the Delayed Message. This Constituted a Contract to Pay Plaintiffs, as Indemnity, the Amount of the Draft, on a Day Certain, in the Event That the Message Was Delayed; and One of the Implied Terms of Such an Agreement Is the Obligation on the Insurer's Part to Pay Interest as Damages for Its Failure So to Indemnify, Whether the Loss by Such Delay Was or Was Not a Liquidated Sum.

The rule denying interest in the case of liquidated damages is, of course, one which governs only in the absence of any agreement, express or implied, between the parties for the payment of interest. If the parties see fit to contract for the payment of interest, even on a sum that must remain unliquidated until ascertained by the judgment, there is no legal principle that forbids the enforcement of such an agreement.

It will be remembered that defendant, by a *special contract* and for an *extra* compensation beyond the ordinary telegraphic tolls, INSURED the immediate transmission and delivery of plaintiffs' message so that it would answer their purpose of intercepting and preventing the payment of the draft. Such an undertaking is one to indemnify plaintiffs for the consequences of the nonperformance of defendant's undertaking, and the obligation to pay such indemnity arises perhaps as early as defendant's failure, but certainly not later than the presentment by plaintiffs of their

claim for that indemnity. In such case, there is implied in defendant's contract a stipulation to pay interest as damages for delay in discharging the claim for indemnity, if there be such delay. This is distinctly held in the case of Curtis v. Innerarity, 6 How. 146, where it is said:

> "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Every one who contracts to pay money on a certain day knows that if he fails to fulfill his contract he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said that such is the implied contract of the parties. See 2 Fonblanque, Eq., 423; 1 Domat, book 3, tit. 5."
>
> 6 How. 154.

We do not by any means consider that we are here required to combat either the general rule denying interest on unliquidated demands, or the application of that rule to cases in which the difference between the parties is one of *liability or non-liability,* instead merely of one respecting the *amount* of an *admitted* liability. We stand upon the absolutely unquestioned ground that plaintiffs' was a liquidated demand, and

that the only question ever open to dispute between the parties, was whether the defendant was originally liable for $11,250.00 or for nothing. This was the amount of the draft paid contrary to plaintiffs' wishes, as expressed in the delayed telegram, and it was so paid through defendant's failure *promptly* to transmit and deliver that message under a *special contract* by which defendant, *for a special consideration, insured promptness.* Plaintiffs received nothing whatever under the Pitt and Campbell contract,—in fact, *could* receive nothing except on full payment thereunder,—and, by its terms and in fact, they forfeited everything they had paid thereon. *Their loss was exactly the amount of the draft,* and not even a computation was required to determine the same. No question of offset as against that loss is present in the case, *since no benefit*—liquidated or unliquidated,—*accrued to plaintiffs.* We submit, therefore, that plaintiffs are entitled to interest upon their demand from the date of filing their claim in writing with defendant, at the rate of seven per cent per annum. This is their due, both under section 3287 of the Civil Code, and also under that rule of law by which is raised in defendant an implied promise to pay interest.

Plaintiffs' assignment of errors herein is in the alternative, being for the failure of the court to allow interest from the date last named, and being also for the failure of the court to allow interest from the date of the commencement of this action (April 28th, 1909). [Tr. pp. 182-183, 19.] This course was adopted in view of certain of the cases (e. g., McFadden v. Crawford, 39 Cal. 662), which allow interest from the

latter, rather than the former, date. The reason in favor of the allowance of interest from the commencement of the action would seem to apply with equal force to the allowance of interest from the date of the demand, since such commencement merely constitutes a demand in cases where a demand is requisite. (Sedgwick on Damages [9th Ed.], 314, citing White v. Miller, 78 N. Y. 393, and McMaster v. State, 108 N. Y. 542.)

For the foregoing reasons, it is respectfully insisted that the judgment herein is erroneous, and that the same should be modified by the inclusion therein of interest on $11,250.00, the principal of plaintiffs' demand, from June 26th, 1907 (or, at least, from the commencement of this action.)

Respectfully submitted,

SAMUEL POORMAN, JR.,

Attorney for Plaintiffs in Error William Lange, Jr., and J. U. Hastings.

No. 3007.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,

Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,

Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

Reply Brief of Western Union Telegraph Company, Both on the Principal Question and Also on the Claim for Interest

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THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Defendant in Error.

No. 3007

REPLY BRIEF OF WESTERN UNION TELEGRAPH COMPANY, BOTH ON THE PRINCIPAL QUESTION AND ALSO ON THE CLAIM FOR INTEREST.

We respectfully contend that the judgment should have been for the defendant below.

THE SCOPE OF THE INQUIRY ON THE WRIT OF ERROR.

Defendants in Error claim that the Court cannot review the evidence because there was no "motion for

judgment" in its favor at the conclusion of the trial. The authorities cited by counsel, however, relate to the cases of general findings. In this case, special findings of fact were requested and made. The assignments of error charge that in many material particulars the findings are not supported by the evidence, but the chief basis of the appeal is that the special facts found entitle the defendant below to judgment in its favor.

I.

THE CHARACTER OF THE CONTRACT RELATING TO THE SALE OF THE STOCK.

The whole question here is this: Could Pitt and Campbell in the case of non-payment, maintain an action upon the contract to collect the amount due? Plaintiffs claim that the rights of Pitt and Campbell ceased when the purchasers failed to make the payment. But the right to have the payment made was the only affirmative right which Pitt and Campbell had under the contract. If they did not possess this right, then they had no rights which could cease or determine upon the failure to pay, except the right to receive stock, which, it must be admitted, did not cease on default in payment. The plain meaning of the clause is that if, upon failure to pay, they take back the stock, which the bank is authorized to return, *then* the right of Pitt and Campbell to have these payments made would cease and determine. In other words, if the contract were an option only, the vendors

had no rights to cease or determine at any time. This would be true if the contract provided only that Pitt and Campbell agreed to sell; and contained no covenant to buy. But if Pitt and Campbell had no right to enforce the payments provided for, then the agreement of Lange and Hastings "to buy, take and receive" the stock and pay the price agreed upon, had no significance and was entirely without meaning.

Plaintiffs state, however, that they agreed to buy "upon terms and conditions." But in all contracts where the seller agrees to sell and the buyer to buy, and the price and terms and conditions are stated, the contract is made upon those terms and conditions. It adds nothing to the meaning of the agreement to state that it is made upon those terms.

THE CONSTRUCTION OF THE FORFEITURE CLAUSE.

There is no question about the rule where the contract provides that in case of default the rights of the *purchaser* only is to cease, or where it provides that the *vendor* only is to be released from all obligation. We have not referred to any of such cases. But what is the rule where the contract provides that both parties are released, or their rights cease, or that the contract is to be null and void and of no effect in law, as the clause is variously phrased? There is but little conflict in the cases upon this question. Among the authorities cited by the Defendants in Error, but one only seems to have any application; that is the case of

Ramsey v. *West,* decided by an intermediate court of appeal in Missouri. And yet the forfeiture clause of the contract under consideration in that case differed in a very material respect from the Lange and Hastings contract involved here, because in that case the parties were to be released upon default in payment, whereas we contend that no such interpretation can be put upon the Lange and Hastings contract, which seems clearly to provide, and especially in view of the positive agreement to buy which is not found in option contracts, that the rights of the parties were to cease and determine, not when the purchasers made default, but when, after default, the sellers, abandoning their right to enforce payment, retook the stock. That, we say, is the clear meaning of the words of the contract and "*thereupon* all rights of each of the said parties shall forever cease and determine." The stock could not be returned "automatically" as counsel say. Pitt and Campbell had the right to demand its return because that right was given them by the law and the contract.

The quotation from counsel's brief in the case of

Beckwith-Anderson v. *Allison,* 26 Cal., 473,

is misleading. The Court, by looking at page 474, where the terms of the contract are stated, will see that Davidson, the purchaser, never in any manner agreed to buy the property, and that none of the

parties even contended that this contract with Davidson was any more than an option.

In

Verestein v. *Yeany,* 210 Pa., 109,

the Court says (See p. 21 of counsel's brief) that under the terms of the agreement; "They (the purchasers) are to be released from liability." As to the cases of

Gordon v. *Swan,* 43 Cal., 564, and
Williamson v. *Hill,* 154 Mass., 117,

as stated in our former brief, page 36, there was no agreement to buy made by the purchasers, but the contract in each case was clearly one of option.

THE CASES CONTRA.

On the other hand, the Supreme Court of the United States in the case of

Stewart v. *Griffith,* 217 U. S., 223,

in considering the effect of a forfeiture clause providing that upon non-payment the contract was to be null and void and of no effect in law, gave controlling effect to the question whether the contract contained a clause *by which the purchasers had agreed to buy and pay the price named,* and held that where the contract so provided instead of containing merely an agreement to sell upon the conditions specified, the agreement was absolute and payment could be enforced.

The Supreme Court of Pennsylvania took the same view in the case of

Weaver v. *Griffith,* 210 Pa., 13,
(See former brief, p. 32).

We agree that the correct rule is stated in

2 *Warvelle* v. *Vendors,* p. 818,

where it is said:

> "The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end."

But the fact is, the Plaintiff in Error in this case is not dependent upon the law of those cases, which do, however, state the prevailing rule, because, as above stated, the contract with Pitt and Campbell provided that the rights of the parties were not to cease upon default in payment, but upon return of the stock.

Counsel at the oral argument contended that the nature of the property which was the subject matter of the contract should be considered, from which they claimed it would appear the purchasers never contemplated that they were entering into an agreement to buy. But if this were true, it was inadvisable to insert in the contract the absolute agreement to buy in the form it was stated.

II.

Counsel further contend that the Finding No. XVII that Lange and Hastings abandoned the contract and forfeited the previous payment, was in effect a finding that Pitt and Campbell had taken back the stock. But this is not so. If we assume that the contract was an absolute agreement to buy and the purchasers broke the contract and failed to make the payments, it would follow in any event that previous payments would be lost or forfeited. There would certainly be no way by which they could be recovered. Counsel cites from apt authority to show this in the case of

Glock v. *Howard,* 123 Cal., 1,

> "The law itself works the forfeiture of the money already paid on a contract such as that now under discussion, even in the absence of the express provision therefor."

But if, as stated, we assume, for the purpose of the argument, that the contract is absolute, the finding that Lange and Hastings had abandoned it, would not be a finding that Pitt and Campbell had abandoned it or surrendered their right to enforce payment. There is nothing in the record to show that Pitt and Campbell never asserted a claim or ever permitted the statute of limitations to run, or had or had not taken any action to enforce payment, or that they had received the stock. There is no finding nor evidence nor alle-

gation that Pitt and Campbell ever surrendered their right to enforce the contract.

But if Pitt and Campbell had elected to retake the stock, which is not shown, affirmatively or by inference, it could have made no difference in the case. The liability of the telegraph company was fixed, or not at the time of the payment complained of on April 30th. The stock could not be returned till July 2nd, because there was no default in payment until that date. The claim on which this action was founded was made June 26, 1907, before there was any default, and before the stock could have been returned (Tr., p. 11, par. IX). The liability of the telegraph company can not be made to depend upon the election of Pitt and Campbell at a subsequent time to accept the stock when under the terms of the contract they were not required to accept it. So the controversy reverts to the original question, Were Pitt and Campbell given the right by the terms of the contract to enforce the payment provided for therein?

RECOVERY OF MONEY PAID UNDER MISTAKE.

Furthermore, if the money was paid under a mistake by reason of the delay of the message, as claimed by plaintiffs in the action, there was nothing to prevent its recovery from Pitt and Campbell, and the damages, if any at all, would have been the expense of the prosecution of such action. There was no

change in the position of the parties. The authorities abundantly sustain this proposition.

Crocker Woolworth Bank v. *Nevada Bank,* 139 Cal., p. 964 (see specially pp. 570, 571, 572);
White v. *Stevenson,* 144 Cal., 110;
30 *Cyc.,* 1318.

Counsel argues (page 31 of his brief) that if the word "thereupon" used in the forfeiture clause of the contract refers to the return of the stock and not to the default in payment, then by analogy the word "theretofore" used in connection with the forfeiture of previous payments, must also relate to the return of the stock, and therefore any moneys which should come to the possession of the bank after the time they were actually due, would be forfeited to Pitt and Campbell. This is neither convincing nor true. Under no circumstances could such money be forfeited. If a sum of money representing a payment which was due on May 1st, should have come to the possession of the bank on May 2d, it would have been either a payment or not. If it was a payment and accepted as such by the parties, then it could not have been forfeited because there would have been no default. If it were not a payment, it could not have been forfeited for the obvious reason that only payments under the contract which had been actually made were to be forfeited. If such money were not a payment it would not be forfeited.

III.

On our contention that even if the contract were originally one of option, this option was accepted and the purchasers' obligation became absolute when they mailed the draft to apply as payment, counsel replies that the payment under the contract was to be made in gold coin and not in drafts. But this is beside the question. The offer which was open to purchasers could be accepted by them without making any payment at all until the payment became due. We were not discussing in that connection (though we did in another branch of the case) the question whether the draft was a payment in the proper medium, but we do contend that as it was sent, as alleged in the complaint (Tr., pp. 6 and 8) for the purpose of making payment and as the letters of transmission (Tr., pp. 87 and 88), stated that it was to meet the payment due, plaintiffs thereby accepted the offer and became obligated to make the payment provided by the terms of the contract. While we contend that this was the obvious effect of the mailing of the draft and sending the letters of transmission, yet we earnestly insist that the absolute obligation of Lange and Hastings to purchase the property was created upon the execution of the original agreement and not upon the subsequent acceptance of the offer and mailing of the draft.

IV.

THE STIPULATIONS ON THE TELEGRAPHIC BLANK RELATING TO DELAYS IN DELIVERY AND INSURANCE OF MESSAGES.

The finding of the Court is that the delay in the delivery of the message occurred before the message reached Wabuska, which was an intermediate point and the terminus of the Western Union Company's lines (Finding No. XV, Tr., p. 58). The Stipulation of Facts admits that the message filed in Oakland at 8:50 P. M. reached Reno, Nevada, prior to the hour of 9:30 P. M. of the same evening (Tr., p. 70). The undisputed fact of the case, therefore, is that the delay complained of occurred at an intermediate point. Does the stipulation under which the message was transmitted apply to such delays, and, if so, is such stipulation valid? The authorities on this subject are reviewed at length in the very rceent case in the Supreme Court of California, of

Union Construction Co. v. *Western Union Tel. Co.,* 163 Cal., 298,

referred to in our former brief. Upon a review of the principal cases the Court there concludes as follows:

"For these reasons it (the stipulation) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message

from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee."

This is the doctrine of the Federal Court. The Box case and the Nichols case, referred to by counsel for defendants in error, were decided, as we will indicate, upon other grounds and upon a state of facts which the Court held practically amounted to fraud. Counsel is in error in stating that the decision in

Western Union Telegraph Co. v. *Coggin,* 68 Fed., 137,

was placed upon other grounds. The damages in that case arose not from error in transmission but from *delay.* In the statement of the case, beginning at the second paragraph, on page 138, the Court says:

"The plaintiffs alleged the defendant negligently failed to deliver the message, and by reason thereof Farris failed to pay the $1,250 on the 24th day of July, 1892, whereby the plaintiffs were damaged."

The Court then, after referring to the decision of the Supreme Court in *Primrose* v. *Western Union* that "the measure of damages for mistakes in its transmission *or delivery or for its non-delivery, is the sum paid for sending it,"* says:

"The decision of the Supreme Court in *Prim-*

rose vs. *Telegraph Company* silences further contention on these questions in the Federal Court."

Counsel for Defendant in Error cites the cases of

Box v. *Postal Tel. Co.,* 163 Fed., 138;
Postal Tel. Co. v. *Nichols,* 159 Fed., 643;
Fleischner v. *Pac. Postal Tel. Co.,* 55 Fed., 738,

to show that the stipulation of the message blank referring to delays is void. In the cases cited, the gravamen of the complaint was, not the invalidity of the stipulation, but actual fraud—in receiving important messages, knowing their importance, and at the same time knowing the company's inability to transmit the messages at all, because the lines were down, or for other reason. In the Fleischner case the lines were down, a fact which was known to the telegraph company and not communicated to the sender. In the Box case, the message was never sent at all and the company failed to notify the sender of the fact, although it knew the option the message related to would expire before morning. It is true that the Court said "the message must of course be sent before it can be repeated," but the Court did not in that case decide that the contract was void in respect to delays. On the contrary, it said (p. 141):

"Although the regulation purports to be made against mistakes or delays, it should be construed to refer to such mistakes and *delays* and could be

corrected or avoided by repetition and comparison."

In the recent case of

Gardner v. *Western Union Tel. Co.,* 231 Fed., 405,

decided by the Circuit Court of Appeals for the Eighth Circuit, the claim was based solely upon a *delay of five days* in the delivery of a message. The Court says, page 407, after setting forth the terms upon the message blank, relating to unrepeated messages:

"The evidence showed that on account of the delay in the delivery of the message the plaintiff suffered material damage."

In this case the Court also upheld the validity of the stipulation requiring claims for damages to be presented within sixty days, notwithstanding an express provision in the constitution of Oklahoma that such provisions were void. But this case is cited to show the stipulation applies to delays in the delivery of messages, as well as to errors of transmission. This must be so. In the Gardner case, as in this, there was no error in transmission, but the damage alleged arose solely from delay. If the stipulation, as contended by counsel in this case, would not relieve the company from damages arising from the delay in the delivery of an unrepeated message, there was then

no occasion to consider the validity of the clause in the agreement that claims must be presented within sixty days.

RULING OF INTERSTATE COMMERCE COMMISSION.

In the recent case of

Cultra v. *Western Union Tel. Co.*, 44 I. C. C., 679,

cited in our former brief at pages 67-71, the Interstate Commerce Commission, which has by act of Congress been given jurisdiction to determine the validity of rules and regulations of interstate companies, stated the case in this clear language relating to the assumption of risk concerning errors or *delays,* in relation to unrepeated messages. The Commission said:

> "The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of *error or delay,* while under the latter the carrier assumes the risk in part *or entirely,* as the *case* may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves."

THE ALLEGED INSURANCE OF THE MESSAGE.

Plaintiffs in this case, however, alleged and relied upon the alleged oral contract of insurance of the message. On this question there is but little to add to what is said in our former brief. Counsel contends

that the provision of the message blank for the insurance of messages must be limited strictly to the matter of transmission. This is a new interpretation of this clause of the message blank which is as old as telegraphy. What the company undertakes in the case of an insured message is to deliver the correct copy. The transmission is of no value to the sender unless the message is placed in the hands of the receiver. As stated in our opening brief, it would be but trifling with the Court for the company to attempt to escape liability upon an insured message which has been correctly transmitted but never delivered, on the ground that the insurance only related to the electrical transmission. The alleged oral contract of insurance upon which plaintiffs relied in this case and which was the basis of the Court's judgment, we contend is in direct conflict with the written agreement, of the terms of which the plaintiffs were charged with full notice. See

Postal Tel. Co. v. *Nichols,* 159 Fed., 643;
Primrose v. *Western Union,* 154 U. S., 1.

The terms of the written agreement are:

> "This company is hereby made the agent of the sender *without liability* to forward any message over the lines of any other Company when necessary to reach its destination."

This agreement could not be modified by a parol contract.

Counsel says this stipulation has reference only to telegraph and not to telephone lines, but there is no authority for this statement. The contract provides for the forwarding of the message, "over the lines of *any other company.*" The terms are not restricted to telegraph companies. The stipulation of Facts in this case (Tr., p. 68) recites that

> "in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska, it was necessary that it be forwarded from that point over the line of the Yerington Electric Company to Yerington."

The written stipulation under which the message was transmitted provides, in relation to insurance of messages:

1st: That the contract of insurance must be *"in writing."*

2nd: That the contract shall state the *"agreed amount of risk,"* which it is not even claimed was done in this case.

3rd: That the rate of premium shall be paid as specified in this written agreement.

4th: That "no employee of the company is authorized to vary the foregoing."

As was held in the Primrose and Nichols cases, cited above, the plaintiffs were charged with notice of the terms of this agreement. None of the conditions were complied with.

It is not to be presumed that the telegraph company, having the right to make reasonable regulations and employing necessarily a large army of agents, would so limit their powers as to the insurance of transmission, and yet give them full authority without effort at restriction, to make any sort of verbal contract of insurance of delivery. It is claimed here and found by the Court that because plaintiffs said they "placed themselves in the hands of the agent," it must be presumed he had authority to insure for a premium of 45c against loss and indemnity claimed to amount to $11,250.

The rules and regulations which the law permits the telegraph company to adopt, apply alike to all those who employ its services. There is no special rule or different liability for those who send their messages upon the same blanks and under the same written stipulations, but who also claim that they "put themselves in the hands of the company."

We respectfully contend that the judgment in this case should have been for the defendant below.

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Plaintiff in Error.

ALBERT T. BENEDICT,
Of Counsel for Plaintiff in Error.

(We also print herewith our reply to Brief of Plaintiff in Error on the claim for interest.)

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM LANGE, JR., and J. U. HASTINGS,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY, a corporation,
Defendant in Error.

THE REPLY OF DEFENDANT IN ERROR ON THE SUBJECT OF CLAIM FOR INTEREST.

If there were any merit in the contention of counsel that this Court cannot review the evidence in the case, the objection applies with equal, if not greater, force to the plaintiffs' writ of error. In fact, as to the plaintiffs' writ there does seem to be foundation for the objection. There is a general finding (No. XX, Tr., p. 61) that plaintiffs' damage was $11,250. The record shows no motion made nor special finding demanded on the subject of interest.

THE REASON PLAINTIFFS' CLAIM FOR INTEREST WAS NOT ALLOWED.

We do not deem it necessary to make full reply to the somewhat elaborate and probably over-refined argument of counsel upon plaintiffs' claim for interest, nor to analyze separately the authorities cited on the various subdivisions of this argument. The law in such cases is not intricate. The rule, as stated by the authorities is, that interest will not be allowed on unliquidated demands.

This case is a suit for damages for alleged negligence in the delivery of a telegram. Most of the cases cited by counsel are cases growing out of express contracts for the payment of money. Those on which counsel seems chiefly to rely were cited and reviewed by the Supreme Court of California in

Cox v. *McLaughlin,* 76 Cal., 60,

where it is said by the Court, at page 68, as follows:

> "These and many other cases which might be cited from New York were mainly based upon *express contracts,* in which money was to be paid, services rendered, or a duty to be performed at a fixed and certain time,—cases in which the default of the debtor at the fixed period was apparent, the amount of the recovery, and not the right to recover at all, being the sole question."

These various matters discussed by counsel were considered by the Court and the claim of interest denied because the damages, if any, which plaintiff sustained, *were not ascertained or liquidated* when the alleged act of negligence accrued, but could only be ascertained and determined by the judgment of the court from the evidence. The facts on which the Court based this ruling are as follows:

The plaintiffs had a contract for the purchase of certain shares of stock in a mine for $75,000 and, contending that they had the right to withdraw from this contract, which we deny, attempted to intercept the payment of a draft which had been forwarded to apply upon the contract. The draft, however, was received by the bank and payment was made. Plaintiffs had the right after this payment was made, if they chose to exercise it, to go on with the purchase of the property and, as we contend, were compelled to do so, but whether they were compelled to make purchase or not, defendant alleged that they were not damaged because the stock was worth more than the price they had agreed to pay therefor. The value of the stock was thus made an issue in the case, and this issue was tried along with the other issues in the cause and finding made thereon (Par. VI of Complaint, Tr., p. 34).

If, as a matter of fact, this mining stock, as alleged, was of an actual value greater than the con-

tract price therefor, and, let us assume, was selling on the stock market for such greater price, could it be said the plaintiffs were damaged by this payment? It matters not whether they were or were not required by law to go on and complete the purchase, if, as a matter of fact, they had the right to do so and by so doing would have profited by the purchase. In such case they were not damaged by the act of defendant. If, on the other hand, the stock was of no value or was worth less than the purchase price, it must be conceded that plaintiffs would have sustained damage by the payment of the draft unless the amount could be recovered from Pitt and Campbell as having been paid under a mistake. These were matters in controversy and could only be determined by the Court upon the evidence. This evidence is found in the record. The defendant in support of this defense offered the testimony of W. C. Pitt, one of the owners of the mine, and a party to the agreement, and whose evidence supported the special defense (See Tr., p. 155). In rebuttal, plaintiffs offered the evidence of two mining engineers, Ruddock and Bliss, whose expert opinions were given in opposition to the testimony of Pitt (Tr., p. 156). The Court found on this issue in favor of the plaintiffs, that the stock was practically valueless (Finding XVIII, Tr., p. 60). Not until this issue was determined could the amount

of damages, if any, be *ascertained,* and the demand be considered liquidated.

Counsel, however, invokes the rule that interest will be allowed on unliquidated claims where the amount of the damage can be determined by computation by reference to well established market values. But obviously, such was not the case here. If this stock, in the opinion of plaintiffs, was worth $75,000 in March and, as found by the Court, was practically valueless in April, it cannot well be contended that the damages could have been ascertained by reference to well established market values. The rule which counsel invokes refers to securities or commodities which have standard values, by the use of which damages can be ascertained and mathematically determined by simple computation.

If the Court had found for the defendant on this issue of value of the stock, and had ascertained that the plaintiffs, after the payment they attempted to intercept had been made, could have sold the stock for $75,000 and thus reimburse themselves, then it follows that although all other issues may have been found for plaintiffs, they would have sustained no damage.

This issue of value was determined against us upon a conflict of evidence and we are concluded thereby, but the amount of the damages could not be *ascertained* until the issue had been determined by the Court.

These are the reasons the Court declined to allow interest upon this claim.

Respectfully submitted.

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Defendant in Error.

ALBERT T. BENEDICT,
Of Counsel for Defendant in Error.

No. 3007.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

The Western Union Telegraph Company, a Corporation,
Plaintiff in Error,
vs.
William Lange, Jr., and J. U. Hastings,
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and
William Lange, Jr., and J. U. Hastings,
Plaintiffs in Error,
vs.
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Brief for Defendants in Error William Lange, Jr., and J. U. Hastings.

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The Western Union Telegraph Company, a Corporation,
Defendant in Error.

Brief for Defendants in Error William Lange, Jr., and J. U. Hastings.

STATEMENT OF THE CASE.

This case is before the court on writs or error sued out, respectively, by plaintiffs and defendant below,

who are herein referred to by their several original designations. Judgment was rendered in favor of plaintiffs for the principal amount of their demand, to-wit, $11,250, and defendant now seeks a reversal of that judgment. With great deference to counsel for defendant, we are impelled, by a divergence of view—natural as between opposing advocates—respecting the salient features of the case, to restate the facts as they appear from plaintiffs' standpoint.

The action was brought to recover a loss suffered through defendant's delay, for three days, in the transmission and delivery of a telegram sent by plaintiffs from Oakland, California, to Lyon County Bank at Yerington, Nevada. This telegram was sent under a *special contract* by which defendant, *for an extra toll,* INSURED its immediate transmission and delivery. [Findings X, XII, Tr. pp. 52-53, 56.] By it plaintiff sought to intercept and prevent the payment of a draft in the sum of $11,250 which had been previously mailed by them to said bank, for the purpose of meeting the second of certain seven installment payments under a contract, then in force between themselves and Messrs. Pitt and Campbell, for the purchase by plaintiffs of certain mining stock. [Findings VII-VIII, Tr. pp. 47-52.] That contract provided for an initial payment, which was made upon the execution thereof, and for the deposit in escrow with said bank of the stock in question under escrow instructions therein stipulated for. [Finding IV, Tr. pp. 43-46.] The deposit was accordingly made and the stock was thereafter held by the bank "in accordance with said contract and subject to such disposition as was required

by said contract on the happening of any of the contingencies therein provided for." [Findinig V, Tr. pp. 46-47.] The contract provided for deferred installment payments at sixty day intervals on account of the purchase price of said stock—the first of which was to be made on or before May 1st, 1907—and further provided (as plaintiffs contend) that default in any payment should *automatically* effect the return of the stock by the bank to Pitt and Campbell, the forfeiture of all moneys previously paid by plaintiffs, and the termination "of *all rights* of EACH of the parties" thereunder. [See clause "Third" thereof, Tr. pp. 45-46.]

The contract required payments to be made at the bank *in gold coin,*—the bank being thereby constituted the agent of Pitt and Campbell "for the purpose of receiving any and all payments to be made *hereunder.*" [Tr. p. 45.] Immediately after the execution of the contract, plaintiffs arranged with the bank that it should pay *in gold coin,* to Pitt and Campbell pursuant to the terms of the contract, the amount of any drafts they might send it. [Finding VI, Tr. p. 47.]

On April 27th, 1907, plaintiffs sent from Oakland, California, by registered mail, to the bank at Yerington, Nevada, a bank draft on San Francisco in the sum of $11,250, payable to the bank. This draft was sent for the purpose of meeting the May 1st payment under the Pitt and Campbell contract, and was received by the bank in due course of mail on April 30th, between 8:30 and 9 o'clock a. m. [Finding VII, Tr. pp. 47-48.] Thereafter, on that day the bank, pursuant to its arrangement with plaintiffs, paid over

the amount thereof *in gold coin* to Pitt and Campbell, and later collected the amount of the draft from the drawee thereof.

On the afternoon of April 29th, the day before the amount of the draft was paid by the bank to Pitt and Campbell, plaintiffs were advised by the engineers who had examined the mine at their instance, that the property was valueless, and they thereupon determined to abandon the Pitt and Campbell contract and to notify the bank not to pay any sum on the draft already sent. To that end, on that same evening they offered to defendants at Oakland, for immediate telegraphic transmission and delivery to the bank at Yerington, the following message: "Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows."

At the time they stated to defendant's agent "that it was absolutely necessary that said message be delivered to said bank * * * before banking hours on the following morning * * * and desired to know of said agent in what manner the said plaintiffs could be absolutely assured that said message would be so delivered." They explained the whole situation with regard to the subject matter of the message, including the extreme need for promptness, the terms of the Pitt and Campbell contract, and the amount of the loss that would be incurred if the message failed of such prompt delivery. They further stated to him the facts regarding the mailing of the draft, the time at which it would be delivered to the bank in due course of mail, and their information that the stock was valueless. They advised him that they had de-

termined to make no further payments, and that the purpose of the message was to intercept payment by the bank of the amount of the draft as hereinbefore mentioned. Plaintiffs also stated that unless the telegram was transmitted and delivered before banking hours of the following morning, the bank would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event said amount would be wholly lost to themselves, since they purposed not to proceed under the contract.

Plaintiffs placed themselves wholly in defendant's hands as regards the steps to be taken in employing the latter's instrumentalities for their purpose, stating to its operator that they desired to be advised how the immediate transmission and delivery of their message might be insured or guaranteed. The operator represented to plaintiffs that defendant would INSURE the immediate delivery of said message if plaintiffs would pay defendant the sum of $1.45, which was *in excess* of defendant's *ordinary* tolls. Thereupon, plaintiffs accepted this proposal, delivered the message in writing to defendant, and paid it the sum mentioned. The operator received such payment, wrote upon the message the words "Deliver immediately," and simultaneously accepted said message on the terms indicated, and INSURED to plaintiffs such immediate transmission and delivery. [Finding VIII, Tr. pp. 48-52.]

Defendant did not, at the time, inform plaintiffs that its lines extended only to Wabuska, or that beyond that point the message would have to be transmitted over a connecting telephone line. [Finding IX, Tr. p. 52.] The court found that the charge paid by

plaintiffs "was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant immediately to transmit and immediately to deliver said message in *such manner* and under *such classification* as, *pursuant to the rules and regulations of defendant,* was required in order that defendant would *insure* to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank." [Finding X, Tr. p. 53.]

Nevertheless, said message was not repeated by defendant in the manner provided in the stipulations on the message blank. [Finding XII, Tr. p. 56.] Defendant did not promptly transmit said message to Wabuska, its terminus, on the evening of April 29th, nor did it promptly deliver the same to the Yerington Electric Company (which operated the connecting telephone line), for further transmission by telephone to Yerington, but, on the contrary, wholly failed to transmit said message to Wabuska and to deliver it to Yerington Electric Company until May 2nd. This delay occurred wholly on the lines of the telegraph of defendant. [Finding XV, Tr. p. 58.]

If defendant had, with reasonable promptness, transmitted and delivered said message to the bank, the same would have reached the bank before it had received the draft; and if the bank had received the message before receiving the draft, it would not have paid any amount thereon. However, the bank, as above stated, received the draft between 8:30 and 9 o'clock a. m. on April 30th, and thereafter on that day paid the amount thereof *in gold coin* to Pitt and Campbell, without any knowledge of plaintiffs' desire to

withhold payment. [Finding XVI, Tr. pp. 59-60.] Plaintiffs did not make any further payment on the contract, but abandoned the same and forfeited all moneys paid thereon. [Finding XVII, Tr. p. 60.]

On April 29th, 1907, and at all times thereafter, said mining stock was practically valueless. [Finding XVIII, Tr. p. 60.] By reason of what the court found to be "defendant's *gross negligence*" in delaying the transmission and delivery of said message until May 2nd [Finding XVI, Tr. p. 59], plaintiffs suffered a loss in the amount of the draft [Finding XX, Tr. p. 61]; and, after making written claim therefor within sixty days, as required by the stipulation on the message blank [Finding XIX, Tr. pp. 60-61, brought this action to recover the same.

From Wabuska to Yerington, a distance of eleven miles [Finding XIV, Tr. p. 58], the only means for the electrical transmission of messages was the telephone line of the Yerington Electric Company. This company and defendant had an arrangement for the interchange of business, each charging its own tolls on a message sent over both lines. Each company employed the railroad agent at Wabuska to handle its business and each maintained its office there in the railway station, the telegraph and telephone instruments being within a few feet of each other. [Finding XIII, Tr. pp. 56-58.]

The Scope of the Inquiry on Defendant's Writ of Error.

At the close of the evidence, defendant made no request "for a ruling thereon," nor a "motion for judg-

ment," nor any "motion to present to the court the issue of law so involved." (*Pennsylvania Casualty Co. v. Whiteway,* 210 Fed. 782, 784.) Therefore, under sections 649, 700 and 1011 of the Revised Statutes, this Court will not inquire into the sufficiency of the evidence to support the special findings or judgment. (*Mercantile Trust Co. v. Wood,* 60 Fed. 346, 348; *Citizens Bank v. Farwell,* 63 Fed. 117; *Wear v. Imperial Window Glass Co.,* 224 Fed. 60, 62-63; *Maryland etc. Co. v. Orchard Land & Timber Co.,* 240 Fed. 364.)

We do not understand that counsel seek to have this court review the evidence herein to determine whether it is sufficient to sustain the findings; but even if such evidence be reviewable, the only questions of fact in dispute between the parties were decided adversely to defendant upon conflicting evidence, and therefore, under the familiar rule, the court will not in any event interfere with the findings. Accordingly, the present inquiry is confined to the question whether the findings support the judgment, and to a determination of the correctness of such rulings on the admission or exclusion of evidence as were excepted to.

With respect to such rulings, no argument is submitted by counsel, and we assume that they have abandoned these specifications of error. However, a sufficient answer to any point that may be made respecting the admission of evidence, appears under subdivision "V" of this brief, *infra.*

BRIEF OF THE ARGUMENT.

Points of Law and Fact.

Plaintiffs' recovery herein is dependent either (a) upon their right under the forfeiture clause of the Pitt and Campbell contract, to default in the payment of any of the deferred installments and thereby terminate their liability for future payments; or, failing such right, (b) upon the election of Pitt and Campbell under such forfeiture clause to take back their stock and thereby forfeit plaintiffs' prior payments thereon. Incidental to plaintiffs' right to recover, is their contention (c) that the mailing of the draft by them to Lyon County Bank did not constitute a payment to Pitt and Campbell under the terms of the contract. And lastly, assuming that plaintiffs sustain the foregoing propositions, they must further maintain (d) that the stipulations on the telegraph blank do not operate to relieve defendant from liability for its negligence. Accordingly, the following points on behalf of plaintiffs are made herein, to-wit:

I. The Pitt and Campbell contract left it to plaintiffs' *option* to default in paying the May 1st installment and thereby *to terminate their liability* for future payments.

II. Apart from this question of construction, the finding that plaintiffs made no further payments under the Pitt and Campbell contract but abandoned the same and forfeited all moneys paid thereon, constitutes a finding that Pitt and Campbell exercised their right of elec-

tion (if any) in favor of *declaring a forfeiture* and of taking back their stock.

III. The mere mailing of the *draft* by plaintiffs did not constitute a payment under the Pitt and Campbell contract, wherein its was stipulated that payments should be made *in gold coin.*

IV. The stipulations on the telegraph blank do not, as properly construed, relieve defendant from liability for its negligent delay herein, even if no gross neglect were imputed to it.

(a) The stipulation of non-liability for unrepeated messages applies only to *mistakes* in transmission and to such delays as may be caused by those mistakes. In the case at bar, the message was correctly transmitted and the gist of the action was *delay.*

(b) The stipulation as to the method in which the special insurance of messages may be effected, does not require a written contract of insurance except where *correctness of transmission* is insured, and does not forbid the verbal insurance of *promptness.*

(c) The stipulation of non-liability for messages forwarded over connecting lines does not apply, (1) because it has reference only to connecting *telegraph*—not to telephone—lines; (2) because it comprehends only those *casual* instances in which defendant finds it necessary to forward over a connecting line—not to the case of a *standing agreement* for the forwarding of all messages for a given destination; (3) because it does not inhibit the making of a *special agreement* to deliver beyond defendant's terminus; (4) because it contemplates relieving defendant from liability only

for defaults occurring on the connecting line; and in this case the delay occurred *wholly upon defendant's line.*

V. Plaintiffs put their whole case in defendant's hands and abided by its directions respecting the manner in which the message should be sent under its rules, and defendant cannot escape liability if, in following such directions, plaintiffs failed to comply with some formality required by the telegraph stipulations.

(a) This circumstance renders admissible the testimony of plaintiffs that they were unfamiliar with the telegraph stipulations.

VI. No stipulation on the telegraph blank can relieve defendant from liability for its *gross or willful negligence,* or for bad faith.

VII. The amount of plaintiffs' damage is the value of the draft, with interest from the date of the filing of their claim with defendant.

I.

The Pitt and Campbell Contract Left It to Plaintiffs' Option to Default in Paying the May 1st Installment and Thereby to Terminate Their Liability for Future Payments.

Obviously, if plaintiffs had the right, under their contract with Pitt and Campbell, to withdraw from the transaction and terminate their liability by defaulting in the payment of any installment therein mentioned, defendant's delay in transmitting and delivering the message whereby they sought to exercise this right

and prevent the payment of their draft, caused them to suffer a detriment that they would otherwise have escaped.

Plaintiffs' right of withdrawal depends upon the construction of the Pitt and Campbell contract. The construction of any contract is a matter of determining the intention of the parties thereto; and if, in a contract such as that here presented, the intent is displayed to leave further performance by plaintiffs to their option, there is no rule of law prohibiting the giving effect thereto.

By the contract in question Pitt and Campbell agreed "to sell and deliver," and plaintiffs agreed to "buy, take and receive," the mining stock—not absolutely,—but *"upon the following terms* AND CONDITIONS, to-wit:

"First: The total price or sum to be paid for the said shares of stock is $75,000.00 *in gold coin* * * * payable in the following manner [here are specified the installments with their respective dates of payment];

"Second: It is hereby agreed by [Pitt and Campbell] that immediately upon the payment of [the initial installment], they will deposit in escrow in and with the Lyon County Bank, * * * certificates of stock * * * endorsed *in blank* * * * and representing in the aggregate [the number of shares constituting the subject-matter of the contract], and will thereupon enter into an escrow agreement with [plaintiffs] and said * * * bank, under which said * * * bank shall hold said shares * * *, to be delivered to [plaintiffs] immediately upon the payment by [plaintiffs] of the final payment * * *.

"Third: And it is further agreed that in the event of default by [plaintiffs] in making any of the payments herein provided for, said Lyon County Bank *shall be authorized under the terms of such deposit in escrow,* AND IT IS HEREBY AUTHORIZED, *to deliver all of the shares of stock* so deposited with it pursuant hereto to [Pitt and Campbell], and that all payments theretofore made by [plaintiffs] shall be forfeited to [Pitt and Campbell], *and that thereupon all rights of* EACH *of the said parties hereunder shall* FOREVER CEASE AND DETERMINE."

Considering the terms of this contract as a whole, it is plain that there was no *absolute* sale of the stock, nor any *absolute* obligation on the part of plaintiffs. The certificates were delivered only *in escrow* and were endorsed only *in blank.* By its express terms, on a default in payment there was *automatically* effected *a return of the stock* to Pitt and Campbell. Having preliminarily *elected* (so to speak) to take back their stock on a default by plaintiffs in making payment, Pitt and Campbell were surely never in a position, by making a *different* election, to substitute another contract for the one entered into by plaintiffs. To keep the contract alive and in force so that the rights then existing under it should ripen into an actual sale and transfer of title, plaintiffs were, from time to time, to pay certain installments of the total price named. The results flowing from a default in this regard are *expressly* defined by the contract, and one of those results is stated to be that "ALL *rights of* EACH *of the parties hereunder shall forever cease and determine.*"

That being so, there is no room for construing the provision respecting default as one to be taken advantage of *only by the vendors, at their option;* for the terms employed are contradictory of any such interpretation.

If, in case of default, the vendors had the right to enforce payment of further installments, such right existed only by reason of the contract, *i. e.,* it was *one* of the rights of Pitt and Campbell thereunder. But a default in payment is expressly given the force of causing "*all* of the rights of EACH of the parties," *i. e.,* the rights of Pitt and Campbell as well as those of plaintiffs, to "*forever cease and determine.*" The Court cannot construe *any* right as subsisting in either party after a default in payment, without substituting another contract for the one in question. The effect of a default having been expressed in terms *excluding* any idea that the same would follow *only at the option* of Pitt and Campbell, no terms giving a different effect to such default can be imported or construed into the contract. *Expressum facit cessare tacitum.* To hold otherwise would be to say that though the contract expressly provided for the termination of *all* rights of Pitt and Campbell, yet the only right they could *possibly* have thereafter was none the less still in existence. They had no choice, under their contract with plaintiffs, and under the deposit in escrow, but to take back their stock on any default,—having in such event "*authorized*" its return by the bank to themselves at the very incipiency of the transaction. Surely the law does not countenance a construction so opposed to good

sense as to require, in effect, the striking out from the contract of the provision that, upon default in payment, "*all* rights of *each* of the parties hereunder shall forever cease and determine."

A case precisely in point is that of *Ramsey v. West,* 31 Mo. App. 676. The court there had under consideration the effect of a forfeiture clause in an agreement whereby it was recited that "in consideration of the sum of $20,000, *to be paid* as hereinafter specified, the receipt of $5 of which is hereby acknowledged, the said John S. West *has this day sold* in fee simple to S. C. Schaeffer" certain described lands. "And the said S. C. Schaeffer, for himself and assigns, *agrees,* subject to the *condition* hereinafter named, *to pay* the said sum" in installments therein stipulated. The contract further provided that, on receipt of the first installment, West would deliver to Schaeffer a deed for the premises, and that at the same time Schaeffer would deliver to West notes for the deferred payments, secured by a mortgage. The contract contained the following forfeiture clause:

"It is understood that if the said Schaeffer * * * shall neglect or fail to pay * * * the first payment of $5000.00 on or before the time stipulated, then this agreement to be wholly void and shall *cease to be binding on* EITHER *of the parties hereto.*"

Schaeffer having failed to make the first payment, afterwards refused to carry out the contract and complete the purchase. The lower court held that he was obligated to purchase the land and that the forfeiture

clause was one that could be invoked or not solely at the election of West. In reversing this judgment the appellate court said:

> "The condition of the contract with which it concludes *in express words is made for the benefit of both the parties thereto.* While the principle invoked by the plaintiff's counsel, 'it is a far-reaching principle of common law that a party shall not be allowed to take advantage of his own wrong, and courts will not so construe the contract as to enable the party committing the wrong to take advantage of it,' is a sound principle and firmly established, it has no application to a contract *whose language gives no reason for construction, and is susceptible of only one meaning,* and that meaning is that the party failing to comply with one of the terms of the contract may, as well as the other party, on the happening of the failure, elect to put an end to the contract. Because, although the principle of construction should be given full force, *it cannot authorize the court to make a new and distinct and different contract for the parties.* The contract in this case clearly provides that Schaeffer, upon failing to pay or tender the first payment provided for thereby, might elect to treat the contract as at an end, for the words are, 'then this agreement to be wholly void, *and shall cease to be binding on either of the parties hereto.*' On no ground can we refuse to give the force, effect, and meaning to these words which they plainly intend."
>
> 31 Mo. App. 684.

On rehearing the court cites the case of *Bradford v. Limpus,* 10 Ia. 35, in support of its conclusion that the

contract was an optional one, and says of the same line of authorities cited by counsel for defendant herein (including *Wilcoxson v. Stitt,* 65 Cal. 596, and *Mason v. Caldwell,* 5 Gilm. 196) that "they do not apply to this contract. * * * If the words used in the contract do not convey the meaning given them by us, *it would be difficult to conceive words that would do so.*"

It will be noted that in this case the contract recited that the vendor *"has* this day *sold"* for a purchase price *"to be paid,"* and that the vendee *"agrees to pay,"* and to execute and deliver notes for the deferred installments at the time of the first payment. In the case at bar we have an agreement by Pitt and Campbell to "sell and deliver," and an agreement by plaintiff "to buy, take and receive,"—but these agreements are both explicitly declared to be "upon CONDITIONS." Hence the idea of an *absolute* obligation on the part of plaintiffs to purchase is expressly negatived,—and particularly so when we consider the peculiar terms authorizing the depositary in escrow to return the stock and the unambiguous wording of the forfeiture clause.

A circumstance lending weight to this view is that at no point in the contract do plaintiffs *explicitly agree to pay* anything. The price "to be paid" is recited, but the only further recital is that it "shall be payable" in installments. While the absence of an express promise to pay might not relieve the vendee of his obligation to purchase if there were no forfeiture clause such as is here under consideration, nevertheless that absence is cumulative evidence of an intent to make the forfeiture clause available to both of the parties to the contract.

See, also, *Beewith-Anderson Land Co. v. Allison,* 26 Cal. App. 473, where a contract for the sale of land provided that the vendee should make payment of a cash installment when the agreement was executed, of a further sum on the delivery of the deed, and of the balance in three annual installments. The contract further provided that upon the failure of the vendee to pay the first installment, the vendor should be released from all obligations to convey, and all rights of the vendee should cease, and the cash payment should be "forfeited as damages for the non-fulfillment of the conditions hereof" by the vendee. The court said that "it was * * * unconditionally provided that upon the failure of [the vendee] to comply with the conditions to be performed by him," the forfeiture should result. "Under such circumstances the proposed purchaser has an *option* to purchase, *without any obligation* beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction." [pp. 475-476.]

In *Verstine v. Yeaney,* 210 Pa. 109, 59 Atl. 689, the court had under consideration a contract by which Yeaney agreed to sell and convey certain land to Stamey & Co. for a price payable one-half in six months from the date of the agreement, the balance in two equal annual installments; "and it is agreed that, in case the said W. H. Stamey & Co. does not make the payment within the limits of the time specified * * * then this agreement to be null and void and *all parties* to be released from *all liability* herein." The court said:

"The agreement is *practically an option,* and was so regarded below. It is true it is an unconditional covenant on the part of Yeaney to convey, and there is *an agreement* on the part of Stamey & Co. *to pay,* but their agreement has attached to it—doubtless at their instance—a *proviso* that, if they do not make the payments at the time stipulated, they are to be *released from all liability.* The agreement in Yerkes v. Richards, 153 Pa. 646, 26 Atl. 221, 34 Am. St. Rep. 721, was substantially the same, and the condition as to failure to make payment similar. We declared it to be an option. Here Stamey & Co. never exercised their option by paying the first installment when it became due, and *by their voluntary default elected to say they would not take the property.*"

59 Atl. 690.

The terminology which the parties employ in their contract,—while of importance in determining the nature thereof,—does not in any case require a violation of the obvious intent with which it was used, even though more apt terms might be suggested for the expression of that intent. For example, see *Pittsburg etc. Brick Co. v. Bailey,* 76 Kan. 42, 90 Pac. 803, where, though a contract was designated a *lease* and contained terms of demise, nevertheless it was by the court regarded as a mere *option* by reason of its containing a clause permitting the so-called lessee to surrender the same; and a further clause to the effect that the failure to complete a certain oil well or to make payment would render the contract void after a lapse of two years. See, also, the case of *McConathy v. Lanham,* 116 Ky. 735, 76 S. W. 535, where the court held to be "a mere

option" an agreement by landowners to sell which contained a clause to the effect that if the consideration was not paid within the time stipulated "this contract shall be null and void."

A case closely in point is that of *Williamson v. Hill,* 154 Mass. 117, 27 N. E. 1008. We quote the syllabus in the latter report, as follows:

> "Plaintiff sold defendant certain patent rights in consideration of annual payments which were to aggregate $250,000, upon condition that should any such annual payment become due, and should default in payment be made sixty days after demand, the contract should be null and void. It was stipulated that a single payment of $100,000 might be made in lieu of the annual payments, and that defendant might assign his rights under the contract, the same conditions to be binding on the assignee. *Held,* that the contract was terminable for the benefit of defendant as well as of plaintiff, and, where default has been made in payment, it cannot be recovered by suit, as the contract is then avoided for all purposes."

In the case at bar, the clause *"all rights of* EACH of the parties hereunder shall forever cease and determine," can only mean the rights of the vendors as well as of the purchasers. To give it any other meaning, requires the Court to read *out* of the contract the words "*each* of the parties" and to read *into* it the wholly contradictory expression, "the parties of the *second* part" [plaintiffs]. The present is a much stronger case in this regard than *Williamson v. Hill, supra,* and is not distinguishable from *Ramsey v. West,*

supra, nor, on principle, from *Gordon v. Swan,* 43 Cal. 564, *q. v.*

It is clear, therefore, that no absolute sale of the stock was made. By the contract's own terms, the sale and purchase were declared to be "upon * * * *conditions*"; and one of those "conditions" was that, upon default by plaintiffs in paying any installment, "*all* rights of EACH of said parties hereunder shall forever cease and determine." It is impossible to suggest language that would point more unmistakably to the intention that, upon default, there should be effected *automatically*—that is, by the *terms* of the contract *itself,* and not by the *election* of the vendors,—what was, in effect, a wiping out of "*all* rights" secured to "*each* of the parties" thereto. In precise phrase the contract defined the sole rights existing in case of default and the very steps to be then taken by the depositary in escrow, and expressly declared the non-existence of any other rights whatever.

A forfeiture is not favored by the law; and a forfeiture that can be invoked or not, according to the election of only one of the parties to a contract, should meet with especial disfavor, since it gives that party the further advantage (beyond such as is accorded by a simple forfeiture) of an election on his part to enforce either further performance or the forfeiture—accordingly as the one or the other may seem, at the time, to be the more profitable to him and, therefore, the more onerous on the other party. But where the forfeiture provided for is, in a manner of speaking, *compensated for* by having annexed to it the effect of

wiping out all further rights and liabilities under the contract, there is less reason for viewing it askance. In other words, the party forfeiting gets some value for the money forfeited; whereas in the case of a forfeiture that may be exacted at the election of the other party, either the forfeiture is invoked (in which event he loses his money), or the performance of the contract is enforced (in which event he may stand to lose more),—and this without his being able, in most cases, to foresee what will be the result of his defaulting.

A purchaser may very well prefer to lose what he has already paid on a contract rather than go on under it; and it is certain that he will always, if possible, so draft his contract that default in payment will terminate further liability. The law itself works the forfeiture of the money already paid on a contract such as that now under discussion, even in the absence of the express provision therefor. (*Glock v. Howard etc. Co.*, 123 Cal. 1.) On the other hand, the vendor will always, if possible, so draft the contract as to give him the election either to enforce a forfeiture or to compel a performance. Without a word in the contract on the subject, the law would give him this election. (*Id.*) Therefore, when the parties insert a provision as to forfeiture and the termination of all rights of *each* of them by the mere fact of defaulting in payment, it is reasonable to suppose that they intended thereby to assent to something different from what the law itself would have read into the contract in the absence of such a provision. The only other possible

intent embraced within the meaning of the words here actually employed is that the forfeiture should be worked *by the terms of the contract itself*—not by the election of the vendor,—the vendor yielding a point that, in the absence of the special stipulation, would have been his, and the purchaser gaining what would otherwise have been denied him. In other words, the forfeiture has some element of mutuality and is, therefore, not so abhorrent as is the ordinary forfeiture for lack of that quality.

The construction here contended for is not only reasonable, but it is the only construction that gives their plain meaning, or any force whatever, to the words "thereupon" (*i. e.,* upon default in payment) "*all* rights of *each* of said parties hereunder shall forever cease and determine." This construction is the only one that would even suggest itself to the layman. Both parties to the contract acted upon it as the only tenable one,—plaintiffs sending their telegram in reliance upon its correctness and explaining to the telegraph company that they had the right to terminate the contract by withholding payment; and Pitt and Campbell taking back their stock (as we shall see) without even suggesting that they had any claim against plaintiffs for the unpaid balance of fifty-five thousand dollars.

If our interpretation be a reasonable one and the only one giving any force to the words declaring that upon default "*all* rights of *each* of said parties hereunder shall forever cease and determine," it must be given to them unless some rule of law forbids or in-

validates stipulations of this nature; and it will hardly be pretended that any such rule exists. That defendant's contention is without merit must be apparent if we but ask ourselves,—"What right of Pitt and Campbell was to cease and determine upon the default *except* it be the right they might otherwise have had *to enforce further payment?*" There could be no other possible right in the vendors; for the contract and the escrow thereunder expressly secured to them the *right* to the return—not to say *actual return,*—of their stock, and the *right* to the forfeiture, and the *actual forfeiture,* of all moneys previously paid. It was their only remaining right—to enforce further payment by plaintiffs,—that the contract expressly declares to be non-existent after a default.

In *2 Warvelle on Vendors,* p. 818, it is said:

> "But forfeitures are not and never have been regarded by the courts with any special favor; and where a party insists upon a forfeiture, he must make clear proof and show that he is entitled to it. It has ever been regarded as a harsh way of terminating contracts, * * *. The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end." * * *

The author, after recognizing cases of the class of *Wilcoxson v. Stitt,* 65 Cal. 596, proceeds as follows:

> "But while forfeiture, as a general rule, is a privilege of the vendor, to be exercised or not at

his option, and the vendee is debarred from treating the contract as rescinded merely by a surrender of possession and a waiver of any further rights in the money previously paid by way of earnest or upon installments, yet the *wording* of the agreement relating to forfeiture may under some circumstances *be construed to create mutual covenants that will extend this privilege to the vendee as well.* Cases of this kind are not difficult to imagine, and the books furnish us with precedents on which to base the rule. Thus, where by the terms of the agreement it is stipulated that upon failure to make payments as agreed, or if such failure continue for a specified time thereafter, all payments theretofore made should be forfeited, and the agreement shall thereafter be null and void, if default occur the contract, by its terms, comes to an end at the time limited. [Citing *Streeper v. Williams,* 48 Pa. St. 450.] A contract so worded has been held to create mutual covenants—the vendee in case of default agreeing to forfeit all moneys previously paid, and the vendor agreeing that thereafter the contract shall cease; or, in other words, in consideration of the vendee's agreement to forfeit the money which he shall have paid, the vendor agrees to accept that in full satisfaction of the agreement, and to release and discharge the vendee from all subsequent liability thereon." [Citing *Neill v. Peale,* 4 Atl. 830, Pa.]

2 *Warvelle on Vendors,* p. 821.

It is submitted that the case at bar is precisely of that class of cases discussed in the foregoing quotation from Warvelle.

The present is not a case wherein ordinary property was the subject-matter of the contract, as in *Wilcoxson*

v. Stitt, supra (city realty); but is one where the investment was of the same hazardous nature as in *Gordon v. Swan, supra* (a mine) and in *Williamson v. Hill, supra* (patent rights), in the latter of which it was said that the purchaser's right under such a contract was to determine, from time to time, whether he would pay an additional installment and thus continue the contract in force for a further period, or whether he would forfeit what he had already paid, forego any rights to the property, and escape further liability.

Here in the West, where mining is one of the chief industries, we are thoroughly familiar with contracts wherein purchases of mines or mining stocks are made under conditions very similar in form to those under discussion. The deeds or certificates are in each instance placed in escrow to await the issue of the transaction. An immediate or early payment of a more or less substantial sum is made, and it is provided that the balance shall be paid in installments at stipulated times. The aggregate of these installments, *i. e.,* the total purchase price, is usually very large, and bears relation rather to the optimistic estimate of the prospect-owner than to the visible worth of the property at the date of the contract. The prospective purchaser is willing to enter into such a contract because he reckons on paying the total price only in case the mine, on development or adequate prospecting, justifies the sanguine expectations of the owner; and he has the interval between any two payments within which to determine, from such current development as may have a bearing on the value of the prospective investment, whether he

will keep alive his option or conditional contract of purchase by paying the next installment. If the mine turns out well, he pays an adequate consideration therefor. If it does not, he defaults in the payment of an installment; his forfeiture compensates for the privilege he has enjoyed; and the property is handed back to the vendor, to whom no injury results, since he not only retains the property he started with (and usually the improvements made by the prospective purchaser) but also all moneys paid on account prior to the default. It is plain, therefore, that there is no unfairness in construing such contracts in the manner here contended for and as the Supreme Court of California construed a similar one in *Gordon v. Swan, supra.* Moreover, to adopt any other construction would be equivalent to prohibiting the investment in most mines of that capital without which their wealth must forever remain unavailable.

We submit, therefore, that plaintiffs had the right, *either* to keep the Pitt and Campbell contract alive by paying the installments from time to time as therein provided, and thereby finally to become absolutely entitled to the stock, *or* to default in payment at any time and thus "forever" terminate "*all* rights of EACH of the parties" to the contract.

Counsel contend that the words of the contract,—"*thereupon* all rights * * * shall cease,"—do not relate to the default in payment, but to the return of the stock. [p. 23.] From this premise they reduce our construction of the contract to the absurdity of denying to Pitt and Campbell, upon plaintiffs' default, even

the right to the return of their stock, for the reason that such right was one that *thereupon* ceased. The difficulty that counsel seek to create in this respect grows out of a failure to differentiate the rights as between plaintiffs and Pitt and Campbell on the one hand, from the distinct rights as between Pitt and Campbell and the bank on the other.

The default in payment gave instant rise to the duty of the bank to return the stock to Pitt and Campbell and contemporaneously forfeited past payments to them. But it is not to be lost sight of that the *bank's* duty in this regard arose *only under the terms of the deposit in escrow*—not under the Pitt and Campbell contract, to which the bank was not a party. True, the latter contract provided precisely what the terms of the escrow should be, and the oral escrow agreement and instructions followed the pertinent provisions thereof. But they were distinct agreements to the later of which only was the bank a party. Therefore, in the use in the Pitt and Campbell contract of the phrase "*thereupon* all rights of each of said parties hereunder shall forever cease and determine,"—we find nothing upon which counsel can base their attempted *reductio ad absurdum*. As between the parties thereto, *i. e.,* plaintiffs and Pitt and Campbell, all rights of *each,*—of the former to purchase and of the latter to sell,—ceased upon and by reason of the contemporaneous default and forfeiture. These were rights *"hereunder."* But the duty of the bank still subsisted under the oral escrow agreement. As depositary in escrow, the bank was the trustee of an express trust invested

with duties the performance of which neither of the parties to the agreement for the deposit could forbid. (*Manning v. Foster,* 49 Wash. 541, 18 L. R. A. (N. S.) 337; *Cannon v. Handley,* 72 Cal. 133.) Moreover, Pitt and Campbell's right to the stock, *i. e.,* their ownership, did not *arise* under the contract, and it still subsisted though that contract was wiped out.

If the adverb "thereupon" refers to the moment of the return of the stock (as counsel argue) rather than to the moment of default in payment, then the adverb "theretofore," used in an identical construction in the phrase "all payments *theretofore* made shall be forfeited," must likewise refer to the moment of such return. This would entail the forfeiture of all moneys that might have come into the bank's hands even after the date on which a default had been made—an intent that cannot be attributed to either of the parties. For example, if plaintiffs made a payment on a day later than that on which it was required to be made under the contract, Pitt and Campbell could then, under counsel's view, elect to take back their stock and forfeit all payments *theretofore* made, *i. e.,* prior to the return of the stock,—thus embracing in the forfeiture the very payment delay in making which constituted the default. Such an inequitable construction could not possibly be sustained, and to avoid it the word "theretofore" would be held to refer to the moment of default. Accordingly, the adverb "thereupon" must be held likewise to refer to the same moment.

In this connection, note that the word "thereupon" does not occur in the phrase providing for the forfeit-

ure of all moneys paid by plaintiffs. If counsel's contention is correct, the right to the forfeiture could only arise upon the physical repossession of the stock by Pitt and Campell. The contract, however, is explicit that a forfeiture occurs upon the mere default, and necessarily the determination of all rights must take place at the same moment, since it is impossible to conceive of the parties agreeing that prior payments shall be forfeited and yet that plaintiffs' liability for future installments shall be kept alive until they actually receive from the bank the physical redelivery of the stock.

The forfeiture clause of the Pitt and Campbell contract is very different in its provisions from what counsel's purported synopsis of it would lead one to expect [p. 22]. According to counsel, the contract provides "that in the event of any default in payment the bank *shall be* authorized to return the stock." If this were true, it might possibly follow that the bank's authority was *to arise in the future* after default had been made, and was to be given by the vendor alone. The points of difference between the actual contract and counsel's synopsis are obvious, and are conclusively in favor of our construction. They are as follows: (a) The authority to return the stock is to be given "under the terms of the deposit in escrow" long *before* a default could possibly occur; (b) as between themselves, the parties to the contract unite in presently conferring that authority in this very instrument *before* even any escrow agreement was entered into; and (c) it is agreed that default in payment shall be the contingency in which that authority shall be *exercised* by

the bank,—not as agent of either party, but as trustee of *both*. In view of these circumstances, how can it be said that *one* of those parties might vary the terms of the trust by forbidding the bank to do what both parties *preliminarily agreed* that the bank had authority to do in event of any default in payment?

Counsel seeks to make some capital out of the fact that "the bank was not *directed* or *compelled* to return the stock * * *; it was only given *authority* to do so" [p. 23]. When one person simply confers authority upon another to do an act for him, of course the principal (except in the case of a power coupled with an interest) can revoke the authority. But a depositary in escrow is not a mere agent; he is the *trustee of an express trust* with duties prescribed in advance by the escrow agreement, to which alone can he have recourse for his sailing instructions. If the two *cestuis que trustent* unite in an agreement that, in a certain event, the depositary "shall be authorized, and he is *hereby authorized,*" to pursue a definite line of conduct, and thereupon make the deposit in escrow under instructions so "authorizing" the depositary, neither *cestui* can revoke those instructions. (16 Cyc. 568.) The very essence of an escrow is that it is "beyond the control of the grantor for all time." (*Id.*) What is thereafter to be done with it depends—not upon the will or election of either of the parties,—but upon the happening of the contingencies provided for in the escrow instructions. A deposit subject to the subsequent instructions of the grantor is no escrow at all. Yet it cannot be doubted but that there existed an escrow in the case at bar.

It will not escape the Court's attention that, at the date of the trial herein, any action on the contract by Pitt and Campbell against these plaintiffs had long since been barred by the statute of limitations. This circumstance bears a double aspect. Not only was it then impossible for Pitt and Campbell to maintain any action thereon, but their permitting the statutory period to run without seeking redress against plaintiffs indicates either an election to take back their stock or complete acquiescence on their part in the construction placed upon the instrument by plaintiffs when they determined to abandon the contract by defaulting in payment. In *Mitau v. Roddan,* 149 Cal. 1, the court found it unnecessary to construe the contract before it, because of the practical construction placed thereon by the parties, "which," said the court, "is *controlling*" and "which renders it immaterial to consider what might be the literal construction of its terms." The court proceeds:

> "It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is *alert to his own interests, and to insistence on his rights,* and that whatever is done by the parties contemporaneously with the execution [*i. e.,* the performance] of the contract is done under its terms as they understood and intended it should be. * * * The law, * * * recognizes the practical construction of a contract as the *best evidence* of what was intended by its provisions. * * * in any subsequent litigation which involves the construction of the contract, [the law] adopts the practical construction of the parties as

the true construction and as the *safest* rule to be applied in the solution of the difficulty."

149 Cal. 14-15.

We do not notice counsel's suggestion, at page 25 of their brief, that the "vendee could not escape obligation to convey by failing to convey," further than to say that a contract which neither party is bound to perform is no contract at all, and that their supposititious case is not analogous to the one at bar. Here the obligation existed on the part of Pitt and Campbell to transfer the stock if plaintiffs elected to pay, and did pay, all of the installments. In fact, the deposit in escrow put this matter beyond the control of the vendors.

(a) *Distinction Between the Forfeiture Clause of the Pitt and Campbell Contract and the Clauses Involved in the Cases Cited by Defendant.*

Counsel cite in this connection only those cases "which provide that upon such default [in payment] all the rights of the parties shall cease or such contract be void and of no effect" [p. 26]. They are of no force herein because they merely enunciate the general rule as to forfeiture clauses, leaving untouched our contention that the terms of the present contract preclude its application.

The fact is that the words,—"all rights of *each* of the parties hereunder *shall forever cease and determine,*"—taken in their context, furnish the very degree of clarity, precision and certainty that the law requires in a forfeiture clause before considering it as

intended for the benefit of both parties to the contract. They indicate *unmistakably* an intent that the clause shall be self-operating; and particularly must this be apparent when it is considered that the earlier portion of the paragraph in which they occur, ordaining the future course of a depositary in escrow, can leave no right of election in either party.

On the other hand, the expression,—"the contract shall be *void,*"—is equivocal, ambiguous, and therefore open to construction. "*Void*" is frequently—nay, almost universally,—held to mean "*voidable*"; and when it occurs in a forfeiture clause where the contingency is default in payment, it is always so held in order not to impute to the parties the unusual intent that one of them may take advantage of his own default. The cases cited by counsel are all of this class; and yet they all recognize *that there is no rule of law forbidding parties to so contract that the one defaulting may thereby bring the contract to an end for all purposes, provided apt and unambiguous words be used for that purpose.* The opinion of the lower court herein distinctly states this, and declares that the plaintiffs have employed such apt terms. [Tr. pp. 160-161.]

In the case of *Cape May Real Estate Co. v. Henderson,* 79 Atl. 982 (Pa.), the court, in applying the general rule to the forfeiture clause there in question, says:

> "There is no covenant that the defendant should by his default be released from his obligation to pay, *nor that the rights of the grantor under the contract should cease.*"
>
> 79 Atl. 983.

The italicized words which the Court failed to find in that case are present in the Pitt and Campbell contract in practical identity. In the clause "thereupon *all* rights of EACH of the parties hereunder shall forever *cease* and determine," there is no lack of precision, no ambiguity, nothing susceptible of construction. The only default mentioned in the contract is default in payment by plaintiffs. Both parties to the contract are separately mentioned in the selfsame paragraph in which this clause occurs. And yet in the face of this, the contract is particular to define the rights that are, upon such default, to cease and determine forever as "*all* rights of *each* of the parties hereunder."

We attach some importance to the expression, "shall *forever cease and determine.*" There is a sense of finality therein that is absent from any such clause as, "the contract shall be *void.*" *"To cease"* is *"to come to an end." "To determine"* carries the idea of cessation a little farther, and means,—*"to reach a set limit or termination; to cease to be; hence, to lose binding force."* A *"limit"* is *"a line, point or boundary beyond which whatever is bounded ceases to extend, avail, operate, etc." "Termination"* is defined as *"a limit in point of time; an end of continuance or duration; close; end."* A *"set"* limit or termination is one *"established by authority or agreement; prescribed; ordained; appointed."* (Standard Dictionary.) The adverb *"forever"* emphasizes this finality. It means *"throughout eternity,"* or in the present context, to be more exact, it means *"thenceforth throughout eternity."* Can a limit or termination of rights be said to be *"set,"*

when it is a future uncertain event, which, if it occurs at all, may then be declared by one of the parties, at his whim, to constitute *no* termination of *his* rights?

The case of *Wilcoxson v. Stitt,* 65 Cal. 596, cited by counsel, is clearly distinguishable. That was a case of an agreement for the sale of land wherein the purchaser paid one-half of the price and agreed to pay the balance by a certain day. It was provided that "in the event of failure to comply with the terms and all the conditions hereof by the [purchaser, the vendor] shall be released from all obligations * * * to convey said property * * * and the [*purchaser*] *shall forfeit* all right thereto, and this agreement shall be *void*"—after which followed a provision whereby the vendor, "on receiving such payments, at the time and in the manner above mentioned," obligated himself to convey. The vendor, on default in payment, sued to recover the balance mentioned. This action was sustained, the Court holding that the provision as to default gave the vendor the opition either to avoid or to enforce the contract.

It will be noted that in the *Wilcoxson case,* the terms of the contract expressly released the vendor, on the purchaser's default, from the obligation to convey and forfeited the latter's right to the property. It was natural, therefore, to read the further provision—that "this agreement shall be *void,*"—in the light of those particular stipulations and to hold that it really meant *"voidable"* by the party whose obligations in the premises were released by the other's default. By so construing the contract, every portion of it would, in

conformity to the elementary rule, be given some effect; whereas, if the clause,—"this agreement shall be void," —were construed literally, the clauses releasing the vendor from the obligation to convey and forfeiting the purchaser's right to compel a conveyance, would be rendered superfluous and of no effect whatever, in that the same ground would have been covered by the clause avoiding the agreement. And it is common learning that the word "void" is frequently used, where the term "voidable" would be the exact expression of the idea it is intended to convey.

The case at bar is much more like the case of *Gordon v. Swan,* 43 Cal. 564, and *Williamson v. Hill,* 154 Mass. 117, 27 N. E. 1008, and is indistinguishable on principle from the cases cited herein in support of plaintiffs' construction, particularly the case of *Ramsey v. West,* 31 Mo. App. 676.

It is plain that the provision as to default in payment was inserted for the very purpose of allowing plaintiffs to withdraw from a hazardous investment at any time, and by so withdrawing, to free themselves from all possibility of loss beyond what they had already paid the vendors. If, by defendant's gross negligence, plaintiffs were hindered from taking advantage of a condition of the Pitt and Campbell contract of which they desired to avail themselves, they are entitled to recover the amount of the benefit they would have obtained if they had not been so hindered. (*Gray on Communications by Telegraph,* Sec. 82.) That benefit was the saving of $11,250, which, as is found, would not have been paid to Pitt and Campbell, but for de-

fendant's failure to deliver the telegram *as specially agreed* in consideration of the payment of an *extra compensation.*

II.

The Finding That Plaintiffs Made No Further Payment Under the Pitt and Campbell Contract, But Abandoned It and Forfeited All Moneys Paid Thereon, Constitutes a Finding That Pitt and Campbell Exercised Their Right of Election (If Any) in Favor of the Forfeiture.

The court found:

"That plaintiffs did not make any further payments on the purchase price of said shares of stock * * * but abandoned said contract with said Pitt and said Campbell and forfeited and lost all moneys paid thereon." [Finding XVII, Tr. p. 60.]

Also:

"that by reason of defendants' gross negligence in failing to transmit and deliver said message immediately * * * plaintiffs suffered damage and loss in the amount of the value of said draft." [Finding XX, Tr. p. 61.]

There is a further finding that if defendant had promptly transmitted and delivered the message the bank would not have paid Pitt and Campbell any sum on the draft. [Finding XVI, Tr. p. 59.] There was evidence in the case which would have sustained a finding that Pitt and Campbell had elected to take back their stock on defendants' default. But apart from

that, if, as a matter of fact, plaintiffs made *no* further payments but *abandoned* the contract and *forfeited* all moneys paid thereon, then Pitt and Campbell must necessarily have elected to take back their stock (assuming they had any option at all). The ultimate fact was the forfeiture; the probative facts were the default in payment and such election to retake the stock, and, of course, the ultimate fact only need be found. Accordingly, although counsel's contention that there was "no evidence that the stock had ever been returned to Pitt and Campbell, or that they had ever demanded its return" [p. 24], cannot be presented on the record herein, it would not be sustainable even if the argument were directed against the sufficiency of the findings.

Surely defendant is controlled herein by what Pitt and Campbell *actually* did—assuming that they had any election,—and not by what they *might* have done, but did not in fact do. When they worked the forfeiture of the moneys already paid, plaintiffs suffered as much by defendants' negligence as though they had had (in conformity to our contention) the absolute right to withdraw from the contract.

Though the fact that the stock *was* returned to Pitt and Campbell, is necessarily involved in the finding of the abandonment and forfeiture, plaintiffs are really not concerned with what happened *as between the bank and the vendors,*—the important points being that further payments were *not* made by them, and that they *abandoned* the contract and suffered a *forfeiture,*—all of which is covered by both evidence and findings.

But if Pitt and Campbell could have elected under the contract either to work a forfeiture or to enforce further payment by plaintiffs, the judgment rendered in plaintiffs' favor is nevertheless proper, in view of defendant's failure to show, as an affirmative defense, that such election in fact was made in favor of the enforcement of payment. In *Vito v. Birkel,* 209 Pa. 206, 58 Atl. 127, it is held that, under the ordinary forfeiture clause, no affirmative election by the vendor to forfeit the contract, upon the vendee's default in payment, is necessary.

III.

The Mere Mailing of the Draft By Plaintiffs Did Not Constitute a Payment Under the Pitt and Campbell Contract, Wherein It Was Stipulated That Payments Should Be Made in Gold Coin.

Counsel contend [p. 37] that, assuming even the Pitt and Campbell contract was one of option, defendant is not liable herein, because it was a continuing offer which was accepted by the mailing of the draft to the bank, the agent of Pitt and Campbell for the purpose of receiving payments; and that this acceptance could not subsequently be withdrawn. On this head, authorities are cited to the effect that when an offer is made by one person, the minds of the parties meet and the contract is concluded when an acceptance thereof is posted to the proposer.

But counsel forget the very elementary proposition that the acceptance of an offer, in order to constitute a contract, must be in the *precise* terms of that offer.

A purported acceptance which injects a new element, is in reality no more than a counter-proposal, which in turn requires acceptance before a contract can be made and which may be withdrawn at any time before such acceptance. Now, in the case at bar, on counsel's theory of a continuing offer that could have been accepted by mail, one of the elements of the offer was "payment *in gold coin at the Lyon County Bank.*" Acceptance of that offer would require the physical production of the *gold itself* at the bank; and granting that payment could have been remitted to the bank by mail or by any other recognized mode of transmission, the thing remitted would have had to be *gold coin,*—not a draft. The sending of the draft would constitute merely a counter-proposal which plaintiffs could withdraw by telegraph prior to its acceptance.

Suppose that, without any prior arrangements with the bank, plaintiffs had, on May 1st, tendered their check, or a draft, or a promissory note, to meet the installment payable that day,—can any one pretend for a moment that the bank would have been under any obligation to accept it and to give plaintiffs an acquittance for the amount thereof as provided in the contract? The bank *might* have done so, but in such event it would, so to speak, have been "on a frolic of its own" and not acting in such capacity as would bind Pitt and Campbell. If it had, in such case, passed the instrument on to the vendors, the latter could have rejected it and refused to recognize the receipt given therefor. If the bank, on the faith of the draft, had paid Pitt

and Campbell in gold, and the draft had then been dishonored, the loss would have been primarily the bank's,—not Pitt and Campbell's.

But the court found that "on the same day, but after the execution of said contract, plaintiffs arranged with said * * * bank * * * to pay the amount" of drafts sent the bank by them *"in gold coin* to said Pitt and said Campbell for plaintiffs, pursuant to the terms of said contract" [Finding VI, Tr. p. 47]; and also that after nine o'clock a. m. of the day on which it received the draft, the bank, "pursuant to its arrangement with plaintiffs * * * *had paid* over the amount thereof *in gold coin"* to Pitt and Campbell, pursuant to the contract, and thereupon forwarded the draft to the drawee thereof for payment. [Finding XVI, Tr. p. 59.] The court found further "that if said bank had received said message before receiving said draft, it would not have * * * paid any amount thereon." [Finding XVI, Tr. p. 59.] The draft itself was payable to the order of the bank. [Finding VII, Tr. p. 47.]

(a) *No Question Arises as to Any Transfer of Property in the Draft at the Moment of Its Deposit in the Mail, or at the Moment of Its Receipt by the Bank.*

From the facts found and above outlined, no question can possibly arise as to any transfer of property in the draft, either at the moment of its deposit in the mail or at the moment of its receipt by the bank. The bank was the agent of plaintiffs for the purpose of advancing the gold thereon, and its possession of the *draft,* with-

out any further act looking toward payment to Pitt and Campbell in the stipulated medium, would be plaintiffs' possession thereof. The result is the same whether we regard the bank's possession to have dated from the mailing of the draft or from its receipt. With respect to its dealings with the draft, the bank was subject to the control of plaintiffs up to the moment that, without notice of plaintiffs' change of design, the *gold coin* had been advanced by it in conformity to its prior arrangement with plaintiffs; and if the telegram in suit had been promptly transmitted to Yerington on the morning of April 30th, the bank would have been advised of such change of design at least an hour and one-half, or possibly two hours, before its actual receipt of the draft,—and therefore before it could have advanced coin thereon or had any dealings therewith.

Accordingly, we pass over counsel's authorities on the subject of property in mailed letters and the agency of the postal department. In doing so, we are not losing sight of the fact that the bank was, by the terms of the Pitt and Campbell contract, constituted their agent for the purpose of receiving payments "to be made *hereunder*"; but the payments to be made "hereunder" were payments *in gold coin* only, and the bank's authority, as such agent, was limited to the receipt of payment in the coin specified.

It is so familiar a rule of law as hardly to call for citation, that a payment to be made in gold coin cannot be made in any other medium.

Ward v. Smith, 7 Wall. 447;
Gilbert v. Garber, 62 Neb. 464, 87 N. W. 179;
Moore v. Pollock, 50 Neb. 900, 70 N. W. 541;
Wilken v. Voss, 120 Ia. 500, 94 N. W. 1123;
Hine v. Steamship Insurance Syndicate, 11 Rep. 777.

An agent to collect or to receive payment has no authority to accept anything in payment but *money* and certainly there is no inhibition upon the right of a principal to designate the *kind* of money that the agent shall accept. And in the event that, in the one case, the agent accepts something else than money, or, in the other case, accepts an unauthorized kind of money, he does so at his own risk and becomes liable to his principal as a result of the acceptance of that risk.

In the case of *National Bank etc. v. American Exchange Bank,* 151 Mo. 320, 74 Am. St. Rep. 527, it is said:

> "The general rule is, that an agent, being authorized to receive money only, has no implied power to receive a check, or anything else except money, in payment, and, if he does so, he assumes the risk of its payment, and becomes liable to his principal for the amount of the check with interest from the date of its receipt by him. *Essex County Nat. Bank v. Bank of Montreal,* 7 Biss. 193."
>
> 74 Am. St. Rep. 532.

A depositary in escrow, as such, is not the agent of either of the parties, but is the *trustee of an express trust upon whom duties devolve, the performance of which neither of those parties can forbid.*

Manning v. Foster, 49 Wash. 541, 18 L. R. A. (N. S.) 337;

Cannon v. Handley, 72 Cal. 133.

The authority of a depositary in escrow is limited *by the terms of the deposit.* So far as the Lyon County Bank was concerned, all of the courses open to it were *irrevocably* defined the moment the escrow agreement was entered into and the deposit made thereunder.

It is plain, therefore, that up to the moment of its turning over *gold coin* to Pitt and Campbell, the bank was acting wholly under the agreement whereby the bank was engaged as plaintiffs' agent for the purpose of converting bank paper into gold at Yerington. As such agent, it was under the instructions of its principals. It was within the power of those principals to revoke their prior arrangement with the bank at any time up to the moment of its acting in good faith thereon.

At pages 42 to 48, counsel discuss the sufficiency of the evidence to sustain finding VI [Tr. p. 47], which recites the arrangement of plaintiffs with the bank for the advancement of gold coin on the credit of their draft. For the reason stated at the outset of this brief, the sufficiency of the evidence to sustain the findings is not here reviewable, and we accordingly omit any discussion on this head. If the question were an open one, the most that counsel could possibly make out

would be a case of some trifling conflict. We do not concede even any *real* conflict, but rather some trivial differences in forms of expression. We pass, therefore, to the questions of law arising on the defenses based upon the stipulations on the telegraph blank.

IV.

The Stipulations on the Telegraph Blank Do Not, As Properly Construed, Relieve Defendant From Liability for Its Negligent Delay Herein, Even If No Gross Negligence Were Imputed to It.

(a) *The Stipulation of Non-Liability for Unrepeated Messages Applies Only to Mistakes in Transmission and to Such Delays as May Be Caused by Those Mistakes. In the Case at Bar, the Message Was Correctly Transmitted and the Gist of the Action Was Delay.*

The stipulations appearing on the back of the telegraph blank are set forth in full in Finding XI [Tr. pp. 53-55.] The purpose of the stipulation requiring the repetition of messages is by its own terms declared to be, "to guard against mistakes or *delays*"; and the repetition is thereby defined as a "telegraphing back to the originating office *for comparison.*"

The case at bar arises *not* out of a mistake in *transmission,* but out of *delay* in transmission and delivery, whereby the message entrusted to defendant did not reach the addressee for three days, and accordingly failed of its purpose. Now, the only *delay* that could possibly be prevented or lessened by a *repetition and*

comparison of the message, is obviously such a delay as would result from mistake in the transmission of the name or address of the addressee. Repetition itself takes as much time as the original transmission of the message, and if no mistake in the address is thereby discovered and corrected, the very act of repeating tends to delay rather than to expedition. In the case at bar, the message—address and all—was correctly transmitted, and therefore the delay complained of was in no way connected with the failure—even had there been such a failure—to have the message repeated.

A corporation discharging such a public calling as that assumed by a telegraph company, can impose upon its patrons only such regulations as are reasonable; and for a regulation to be reasonable in any sense, its observance must, in the nature of things, tend to effect that at which it is professedly aimed. On this very ground, the stipulation as to repetition has been sometimes upheld (although declared void in many other jurisdictions), as a reasonable regulation relieving the company from liability for *such mistakes in transmission,* and for *such delays in delivery,* as would have been prevented by the repetition. The courts have never permitted a telegraph company to shield itself, behind this stipulation, from liability for *delay* in delivering a telegram, except when repeating the message would have naturally tended to prevent the delay,—and then only when the company was *not* grossly or wilfully negligent.

The moment the company attempts to stretch such a stipulation limiting liability, to cover a case wherein

compliance with its terms would have no conceivable tendency to prevent the default with respect to which exemption is sought,—that moment and to that extent, the stipulation becomes an unreasonable regulation, and, notwithstanding its literal import, the law grants the injured party relief.

A case exactly in point, wherein the views here expressed are fully sustained, is that of *Box v. Postal Tel. Cable Co.,* 165 Fed. 138. The court there says of the stipulation respecting the repetition of messages:

> "The rule is not intended to secure a timely effort to *send* the message, but to make more certain its *accurate transmission.* The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. * * * The message must, of course, be sent *before* it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer *to such mistakes and delays as could be corrected or avoided by repetition and comparison;* otherwise, a delay caused by the conduct of the company in negligently failing to send or attempt to send the message would come within the rule. And it is held that it does not apply where 'no effort was made to put the message on its transit.' *Birney v. N. Y. & W. P. Tel. Co.,* 18 Md. 341, 81 Am. Dec. 607. It is difficult to believe that this stipulation was intended by the parties to be applicable to a case in which *the conduct of the company made it impossible*

for the message to be repeated. We believe it would be wholly unjust and not within the intention of the contracting parties to permit this rule to exonerate the company from liability for a failure which, like the one here charged, would not have been prevented by repeating the message." (Citing numerous authorities.)

165 Fed. 141.

In *Purdom Naval Stores Co. v. Western Union Tel. Co.,* 153 Fed. 327, it was held that the stipulation for non-liability in the case of unrepeated messages was inapplicable where there was an utter failure to deliver the message at all.

In *Postal Tel. Cable Co. v. Nichols,* 159 Fed. 643, the Circuit Court of Appeals for the Ninth Circuit distinguished the Primrose case from the case in hand (which was one of delay in transmission due to a connecting line's wires being down) on the grounds, 1st, that the company was advised of the importance of the message and of the time when it would have to be delivered, and then undertook to transmit and deliver the same after satisfying itself of its ability to do so; and, 2nd, that within ten or fifteen minutes after the filing of the message the company became aware of the interruption in its transmission.

See, also:

Fleischner v. Pacific Postal Tel. Co., 55 Fed. 738, affirmed in 66 Fed. 899;

Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734;

Bryant v. American Tel. Co., 1 Daly 575 (N. Y.);

Birney v. New York etc. Telegraph Co., 18 Md. 341, 359, 81 Am. Dec. 607;

Beatty Lumber Co. v. Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

CASES CITED BY DEFENDANT DISTINGUISHED.

Of the cases cited by defendant, not one meets the case at bar. They all arose out of *errors* in transmission,—not out of *delay* therein or in delivery. As already explained, the observance of the regulation as to repeating is the only means adapted to the detection and correction of such errors, and to that end it is a reasonable regulation. But in each of the cases cited by learned counsel, the sender of the message preferred to assume the risk of an incorrect transmission rather than pay the additional one-half rate for attaining correctness. In the case at bar, on the contrary, plaintiffs paid an *additional* toll for *immediate* transmission and delivery, and defendant's agent evidenced the agreement in this regard by writing the words "Deliver immediately" on the message.

In *Primrose v. Western Union Tel. Co.,* 154 U. S. 1, the word "bay," in an unrepeated cipher message, was transmitted as "buy," *i. e.,* a superfluous dot was sent or received over the wire. That case, on which defendant chiefly relies, is thus clearly distinguishable, and in *Pacific Postal Tel. Co. v. Fleischner,* 66 Fed. 899, the rule therein laid down was strictly limited in its application to cases of cipher or obscure messages.

The case last cited was before the Circuit Court of Appeals in this very circuit.

In *Western Union Tel. Co. v. Coggin,* 68 Fed. 137, the message was unrepeated, and the court placed its decision on the ground that it did not appear that the message would have been understood by the addressee nor that the telegraph company had been advised what the message was about—a matter that did not appear on its face.

In *Hart v. Western Union Tel. Co.,* 66 Cal. 579 (which case, by the way, has been since disapproved by this court in *Western Union Tel. Co. v. Cook,* 61 Fed. 624), the word "bail" in an unrepeated cipher message was transmitted as "bain,"—again the transmission of a superfluous dot.

In *Coit v. Western Union Tel. Co.,* 130 Cal. 657, the figures "37" in an unrepeated message were transmitted as "27." In that case it was shown that there were atmospheric disturbances along the telegraph line and the symbol for "3"—to-wit, three dots, a dash, and a dot,—was transmitted as two dots, a dash, and two dots, this being the symbol for "2."

Clearly none of the foregoing cases (of *erroneous transmission*) were instances of *"gross"* negligence, and therefore it was proper, under the authorities, to apply to each the stipulation as to repeating.

We cannot conceive what comfort there is for counsel in the case of *Union Construction Co. v. Western Union Tel. Co.,* 163 Cal. 298. That case simply holds

that the stipulation as to repeating does not apply to *delay in delivering* a message already correctly transmitted; and the reasoning by which the court arrives at this conclusion is precisely in line with that by which we have endeavored to sustain our position herein. Moreover, the delay in the case at bar is not shown to have occurred at an intermediate office (which counsel contends would render the stipulation applicable), but on the contrary, if the message did not reach Wabuska, the delay may have occurred through its having been sent to an office which, with reference to Reno, was beyond Wabuska. In fact, we incline to the view the message flew off at a tangent after it left Reno.

We turn now to the stipulation respecting the insurance of messages.

(b) *The Stipulation as to the Method in Which the Special Insurance of Messages May Be Effected, Does Not Require a Written Contract of Insurance Except Where Correctness of Transmission Is Insured.*

From the terms on the back of the telegraph blank, it is apparent that the telegraph company divides messages into three general classes, as follows:

1st. *Unrepeated* messages.

2nd. *Repeated* messages.

3rd. Messages *"specially insured"* against "mistakes *or delays* in transmission *or delivery,"* or against "non-delivery."

Of this last class of messages those in which *"correctness* in transmission" is to be insured, must be

"insured by contract *in writing,*" and for *such* insurance premium must be paid at the rates specified on the blank. [Tr. pp. 54-55.]

The provision as to the necessity of a writing, and that prescribing the premium rates, apply only to messages *correctness* in the transmission of which is insured. The gist of the present action is *delay,*—not mistake. Therefore, there is nothing in the terms printed on the telegraph blank inconsistent with plaintiff's right to effect—as it is found they *did* effect—an insurance of *immediate* transmission and delivery in consideration of the payment of a rate *in excess* of defendant's regular charge for ordinary messages. [Findings VIII, X, XII, Tr. pp. 51-53, 56.] Nor is there anything inconsistent with those terms in the fact that the rate paid by plaintiffs was less than the sum that would have been necessary to meet defendant's premium charge if plaintiffs had been seeking—what they were not seeking—insurance of *correctness* in transmission.

To elaborate: It appears that defendant does insure both *correctness* of transmission, and *prompt* transmission and delivery. To insure *"correctness in transmission,"* defendant specifically requires a "contract in *writing*" and payment of the premium at the rate set forth. Therefore it follows, as a necessary implication, that to insure *prompt* transmission and delivery, any form of contract is sufficient, since there is no special requirement of a writing for this case. And it is to be noted that as no premium rate is specified for this class of insurance, the last sentence of the para-

graph specifying the rates for insurance of *correctness,* —to-wit, "No employee of the company is authorized to *vary* the foregoing,"—has no application whatever to the case at bar.

(c) *The Stipulation of Non-Liability for Messages Forwarded Over Connecting Lines Does Not Apply to the Case at Bar.*

The stipulations on the telegraph blank are to be construed strictly as against the company. Looking at the stipulation as to connecting lines, we find that the company "is hereby made the *agent* of the sender, *without liability,* to forward the message over the lines of any other company when necessary to reach its destination." [Tr. p. 54.] That these terms cannot relieve defendant from liability in the present case is apparent from the following considerations:

(1) The stipulation has reference only to *telegraph* —not to *telephone*—lines. To send a message by telegraph requires special skill and training. This is not so with respect to the telephoning of a message, and, therefore, there is no reason for granting an exemption from liability with respect to forwarding messages by telephone.

(2) The stipulation applies only to those *casual instances* in which the company finds it necessary to forward a given message over other lines, and not to the case of a *standing agreement* or established practice whereunder the company forwards all messages for a given destination over another line selected by it

as the *permanent* instrumentality for that purpose. It would be strange, indeed, to have the sender of a message appoint the company his agent to forward it over a connecting line when, at a previous time, the company had already arranged with that line to transmit all messages offered for transmission to destinations on the connecting line. To *ratify* a *prior* general arrangement and to relieve the company from liability for what may occur thereunder, is one thing; but to *appoint an agent* to forward over a connecting line is a wholly different matter, and contemplates that, subsequent to the appointment, the agent will negotiate with the connecting line for the forwarding.

(3) The stipulation does no inhibit the making of a *special agreement* to deliver beyond the terminus of defendant's lines; and such a special agreement was made in the case at bar.

(4) The stipulation contemplates non-liability only for those defaults *occurring on the connecting line,*—that is, during such portion of the transmission as is beyond the originating company's immediate control. In the case at bar, the delay occurred *wholly on defendant's lines,*—no delivery of the message to the connecting telephone line having been made for three days. [Findings XIII, XV, Tr. pp. 56-57, 58-59.]

On the facts found, it is apparent that the stipulation in question can have no application. Defendant never *exercised its agency* to forward the message in question until May 2nd, and no delay occurred on the connecting telephone line. Plainly the stipulation in

question is intended to relieve defendant from responsibility for the negligence of the connecting line, over which it can have no control. Any other interpretation would render the stipulation itself void as unreasonable. To be in a position to invoke it, defendant *must have forwarded* plaintiffs' message *promptly* and correctly; and to do this it must have transmitted the message immediately to Wabuska and delivered it to Yerington Electric Company. The findings negativing this situation render the stipulation respecting connecting lines wholly inapplicable.

It has been held that where a contract for the interchange of business and the division of tolls thereon is entered into between two telegraph companies, the stipulation on the telegraph blank with respect to non-liability for delays occurring on connecting lines, does not relieve one company from liability for the negligence of the other.

Postal Tel. etc. Co. v. Harriss, 122 S. W. 891 (Tex.).

In *Southwestern Tel. etc. Co. v. Taylor,* 26 Tex. Civ. App. 79, it is held that where there are connecting telephone lines with a common agent at the connecting point, the first line is liable for the negligence of that agent in failing to make the connection between the two lines.

Here, if ever, we have a case wherein is found ample justification for the bitterness of the attack made by the text-writers upon these telegraphic stipulations. Plainly, as Thompson, Gray, and perhaps others point

out, the stipulations as to repeating, insuring, etc., were never *really* intended (however they may be *ostensibly*) to give the public an opportunity of securing by purchase greater speed or care in its telegraphic transactions; but were adopted solely to afford the company a loop-hole through which, under the guise of *limiting* liability, to *escape all* liability for the consequences of every instance of negligent or reckless service.

V.

Plaintiffs Put Their Whole Case in Defendant's Hands and Abided by Its Directions Respecting the Manner in Which the Message Should Be Sent Under Its Rules, and Defendant Cannot Escape Liability If, in Following Such Directions, Plaintiffs Failed to Comply With Some Formality Required by the Telegraph Stipulations.

Under the facts found, counsel's argument on the points based on the stipulations on the telegraph blank, is, for the most part, entirely beside the mark. It is not to be lost sight of that plaintiffs went to the telegraph office; explained to defendant's agent in charge just what their difficulty was and what they desired to do; and, after putting the case fully before him, asked what steps they would have to take "in order to INSURE the immediate delivery" of their message to the addressee. They put themselves wholly on defendant's hands; complied exactly with the instructions given them by the agent; paid all charges

(*including an* EXTRA *fee*) asked of them; and saw defendant's agent write the words "deliver immediately" on the message,—by which words was evidenced precisely what they had agreed and paid *extra* for. [Finding VIII, Tr. pp. 48-52.] It hardly lies in defendant's mouth under these circumstances, not only to assert that the stipulations should be warped from their natural meaning to cover this case (a thing that we have shown to be necessary to make them at all applicable thereto), but, supposing them to be strictly applicable, to invoke them in order to take advantage of the ignorance, incompetence, negligence, or wilful misrepresentation and extortion of its agent.

A telegraph company can do business with the public only through its agents, and on them the public must absolutely rely for information as to the manner in which such business shall be transacted. When the sender of a message states to such an agent just what he wishes to accomplish through the company's public facilities; and, putting himself wholly in the company's hands, asks what steps he must take to effect what he wishes, making no condition or restriction whatever as to cost or charge; and then being advised in this regard, does *exactly* as he is told and in the *precise mode* pointed out to him,—he should, in strict justice, be permitted to rely on the contract thus made even when its formalities do not come within the strict letter of the company's regulations. By the company's act, he is put off his guard and contracts in full confidence that the forms adopted answer to the company's rules. The *onus* of seeing to the ob-

servance thereof is in such case passed to, and accepted by, the company, and its failure in a matter as to which it has special knowledge of the highest character, should be borne by it and not by the sender.

The essence of the employment of the telegraph as a means of communication is speed; and to require the sender to go through the company's regulations to check up and determine the correctness of the representations of the company's agent as to the mode of employing the principal in any particular instance (particularly when a free hand, so to speak, is given the agent by the sender), would be unreasonable in that it would defeat the very purpose of that employment. And when all this had been done by the sender, he would still have to seek—as we have been here compelled to seek—a court's interpretation of those regulations and its determination as to whether he had brought his case precisely within their terms.

In this connection, the oral opinion of the learned trial court, rendered in announcing his decision herein, is illuminative. Judge Van Fleet then said, in part:

"So far as concerns the defense that the company is excused by reason of the failure of the plaintiffs to have the message repeated, assuming that the company could contract against its gross negligence, which I doubt, my view is this: Here are persons going to a telegraph office, unfamiliar, as most of us are, with the exact character of the rules and regulations governing the transmission of telegrams; they hand in a message to the agent, inform him of its importance, and submit to him the question as to what means

shall be adopted to insure the prompt and efficient transmission of that message, and the agent undertakes to inform them as to that method, and they conform to his instructions, and pay such increased toll,—in this instance substantially, if not precisely, what they would have been required to pay for a repeated message, some few cents one way or the other. Now, under such circumstances, it seems to me that it does not lie with the company to say that they are excused because of the mere formal insufficiency of that arrangement, which was suggested by their own agent. I think that the court is entitled to hold that it was in substance and effect a contract for the immediate transmission and the repetition of that message, if that was deemed by its agent the best method of insuring its prompt delivery. In other words, I think that it was in effect a contract of insurance for the immediate delivery of this message. It is true, the agent testified that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay an attention to it.' Certainly, if corporations of this character employ people whose mental and physical makeup is such that important instructions may pass in one ear and out the other, with nothing to interrupt such passage, the responsibility for that defect should not rest upon the patron; it should rest where it belongs, with those who employ the agent; and, therefore, I am unable to sustain that defense." [Tr. pp. 163-164.]

(a) *The Fact That Defendant Undertook to Instruct Plaintiffs How Their Message Should Be Sent Under Its Rules, Renders Admissible Evidence of Their Unfamiliarity With the Telegraph Stipulations.*

The foregoing disposes of the two exceptions reserved by defendant to the admission of evidence at the trial. Briefly, those exceptions were to the rulings of the court in admitting testimony (1) by the plaintiff Lange that he did not read the stipulation on the telegraph blank, and (2) by the plaintiff Hastings that defendant's agent did not call his attention to said stipulations. While, ordinarily, a party dealing with a railroad or telegraph company is bound by the terms of the ticket, bill of lading, or message blank, whether he read the same or not, nevertheless there are numerous exceptions or qualifications to this general rule. Thus in 1 *Elliot on Contracts,* Section 53, it is said:

> "In the first place the nature of transactions may be such that the person accepting the ticket, bill of lading or the like may believe, and justly so, that it contains no terms *other than those already agreed upon* and that it is merely an acknowledgment thereof *not intended to introduce any special terms.* * * * So, ordinarily, when a shipper is given a bill of lading which embodies terms *different* from those *orally* agreed upon, *he is not bound thereby.*" (Citing numerous cases.)

VI.

No Stipulation on the Telegraph Blank Can Relieve Defendant From Liability For Its Gross or Wilful Negligence, or For Bad Faith.

The court found that "defendant with * * * *gross* negligence delayed the transmission and delivery" of the message in question until May 2nd, 1907. In view of the state of the record it is unnecessary to to discuss the evidence upon which this finding is predicated, and accordingly we omit all reference to counsel's discussion of that evidence at pages 55 to 60 of their brief.

Apart from the proposition that the stipulations in question do not embrace, nor even profess to touch, a state of facts such as that here presented, there is no authority giving them the force of relieving the company from liability for *gross* or wilful negligence, or for bad faith. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, has gone farther than any other authority in this direction, but it merely applied the stipulation respecting repetition to a case of *mistake* in the transmission of a cipher dispatch. Here was an error that would have been at once detected and corrected by a "repetition and comparison"; and moreover, such a repetition in the case of a cipher message is of the highest importance in order to insure correctness, since the receiving operator has not a sensible and intelligible context to aid him in discovering errors. The *Primrose* message, in addition, came precisely within the terms of a further stipulation exempting the company from liability for errors in cipher or obscure

messages. The negligence there complained of would obviously not have constituted *gross* negligence even if the sending operator had failed to send the correct symbol; and it is common knowledge that the electric current may be so temporarily interrupted by a variety of natural causes beyond human control, as to result in a long dash being transmitted as a dot and a dash—the very error in that case complained of. But, as said before, in the case at bar we are complaining of *delay* —not of error—and therefore the stipulations as to repetition and written insurance do not apply.

But if they would otherwise apply, *three days' delay* in the transmission and delivery of any telegram,—particularly when its importance was *apparent* on its face and was *fully explained to the company,*—is negligence of so gross and inexcusable a kind as to remove the case from within the sphere in which such stipulations are accorded any force of exemption. The ordinarily prudent and reasonable man,—whose suppositious conduct under circumstances such as those presented in the case under consideration, is always the criterion of the degree of care or negligence displayed,—would infallibly have exercised greater diligence in a matter of such importance. A delay of three days, when the company was *fully advised* of the circumstances that made delivery within ten or eleven hours *absolutely indispensable,* and when it *thereupon undertook for an additional compensation to effect an immediate delivery and evidenced its undertaking in that regard by writing the words "deliver immediately" on the face of the message,*—is

either *gross* or *wilful* negligence,—that is, it amounts to a *wanton disregard* of the rights of plaintiffs.

In *Hendershot v. Western Union Tel. Co.,* 106 Ia. 529, 68 Am. St. Rep. 313, it was held that five hours delay was negligence entitling plaintiff to recover. A delay of ten or twelve hours in transmission, if unexplained, has been held to create the presumption of negligence. See:

Kendall v. Western Union Tel. Co., 56 Mo. App. 192;

Western Union Tel. Co. v. Clark, 25 S. W. 990 (Tex.)

When there are special circumstances, very much less delay will raise the presumption of negligence. In *Western Union Tel. Co. v. Boots,* 10 Tex. Civ. App. 540, 31 S. W. 825, a telegram was sent at midnight and was delivered at 9:30 a. m. It should have been delivered at 8:30 a. m., and this unnecessary delay of one hour was held to be negligence.

So, "a special undertaking to deliver without regard to office hours, in consideration of extra payment, renders the company liable for failure to perform."

Western Union Tel. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439;

Western Union Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229;

Western Union Tel. Co. v. Hill, 26 S. W. 252 (Tex.)

In view of the special circumstances that were fully disclosed to the company in the case at bar, and of

the special undertaking on its part, in consideration of extra payment, to transmit and deliver immediately, there can be no doubt but that it was *grossly* negligent in not delivering the message very early on the morning of April 30th, 1907, at the latest. The fact is that the telegram could very readily have been delivered a couple of hours before the bank received the draft.

The Civil Code of California, Sec. 2162, requires of a telegraph company "*great care and diligence* in the transmission and delivery of messages." In *Western Union Tel. Co. v. Cook,* 61 Fed. 624, it is held in effect that no stipulation of the telegraph company can be permitted to have the effect of relieving it of its obligation to exercise that degree of care and diligence required of it by the statute. (See also *Union Construction Co. v. Western Union Telegraph Co.,* 163 Cal. 298.) Surely three days' delay is not the exercise of that "*great* diligence" required by the law's express provision. Only a *slight* degree of negligence (if one may differentiate between degrees of negligence) would be an absence of such "*great* care and diligence"; or, to put it in another way, any slight or ordinary lack of care when great care is exacted by express legislative enactment, is *gross* negligence. And there can be, according to all the authorities, no exemption from liability for gross or wilful negligence, or for bad faith. See most of the cases herein cited, and also

Redington v. Pacific Postal Tel. Co., 107 Cal. 317;

United States Tel. Co. v. Gildersleve, 29 Md. 232.

In the case of *Pierson v. Western Union Tel. Co.*, 64 S. E. 577 (N. C.), a night message was filed at 8 p. m. and was delivered between 9 a. m. and 10 a. m. the next day. It could have been delivered about 8 a. m. The addressee resided about 200 yards from the telegraph office. The court said:

> "That this is *gross* negligence is not open to discussion."

VII.

The Amount of Plaintiffs' Damage Is the Value of the Draft, With Interest From the Date of the Filing of Their Claim With Defendant.

In our brief on plaintiffs' writ of error herein, we discuss fully what we conceive to be the measure of damages applicable,—our contention being that the court should have included in the judgment on plaintiffs' favor, interest on the principal amount of their demand from the date of the filing of their claim with defendant, and also that the value of the mining stock is not an element to be taken into consideration in determining the amount of plaintiffs' loss. To that brief we now merely refer for such presentation of those points as we desire to make.

Owing to the length hereof, we do not attempt any recapitulation, contenting ourselves with a reference to our "Brief of the Argument," *supra*. Upon the grounds herein discussed (and disregarding for the moment the question of interest), it is urged that the judgment in favor of plaintiffs should be affirmed.

Respectfully submitted,

SAMUEL POORMAN, JR.,

Attorney for Defendants in Error William Lange, Jr., and J. U. Hastings.

No. 3007.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,

Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,

Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

PETITION FOR REHEARING

BEVERLY L. HODGHEAD,
Attorney for Western Union Telegraph Company,
Plaintiff in Error.

ALBERT T. BENEDICT, of New York,
Of Counsel.

Filed this.....day of March, A. D. 1918.

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

The James H. Barry Co., San Francisco.

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Defendant in Error.

No. 3007

PETITION FOR REHEARING.

To the Honorable Justices of the Circuit Court of Appeals of the United States, in and for the Ninth Circuit:

After careful examination of the opinion of the Court rendered in this cause, we respectfully petition the Court for a rehearing upon the following grounds.

We trust that we are not going too minutely into the important questions involved than is directed by the rule in regard to petitions for rehearing:

THE CONTRACT OF SALE.

First: We urge the Court was in error in holding that the contract with Pitt and Campbell was one from which the plaintiffs could withdraw at pleasure. On the contrary, as it contained *an agreement to buy,* it was a contract which Pitt and Campbell had a right to enforce and the condition regarding default did not affect that right.

In interpreting this contract, the Court, in its opinion, says (page 7):

> "When default occurred immediately the authorization to deliver became effective, forfeiture accrued and all rights of Hastings and Lange and Pitt and Campbell under the contract ceased and became determined."

We respectfully contend that this is not consistent with the language of the contract. While it is true that the *"authorization"* became effective upon default, that is, the bank, upon default, was *authorized* to deliver, yet the rights of the parties did not cease when the bank became clothed with the authority to deliver but when that authority was exercised and delivery made.

The Court, however, holds that it became the *duty* of the bank to return the stock upon default in

payment, or, in other words, that it was *required* to deliver it. But such is not the contract. There is no requirement that the bank deliver it. There is no provision that upon default the bank *shall* return the stock, but only that the bank is authorized or, in other words, that it *may* return the stock upon default, and that "thereupon," clearly meaning upon the return of the stock, all rights shall cease. The Court has said that "thereupon" relates to the default and that it then became the duty of the bank to return the stock and Pitt and Campbell had no alternative but to accept it. But we earnestly insist that the word "thereupon" means, and was intended by the parties to mean, that the rights of the parties should cease and determine upon the *return of the stock*. This is clear for the following reasons: There was no need for Pitt and Campbell to authorize the return of the stock *upon default* in payment. The stock was their property anyway. They had the right by *ownership* to its return upon default in payment without agreement or authorization from themselves. But while Pitt and Campbell had the right to take the stock, *they also had the right not to take it, but to insist upon the enforcement of the contract and the payment of the price which Lange and Hastings agreed absolutely to pay.*

These are the conditions subject to which Pitt and Campbell agreed to sell and Lange and Hastings agreed to buy. To hold that the absolute agreement

of Lange and Hastings to buy the stock and to pay the stipulated price therefor was made upon condition that they could withdraw if they chose means only this: That they agree to buy subject to the condition that they buy, or that they agree to pay provided they pay, and they are not deemed to have agreed to pay if they do not pay, which, of course, means nothing. This construction is opposed to the decision of the Supreme Court of the United States in

Stewart v. *Griffith,* 217 U. S., 323,

cited at page 27 of plaintiffs' opening brief on appeal and the other cases cited, as follows:

Wilcoxin v. *Stitt,* 65 Cal., 596;
Central Oil Co. v. *Southern Refining Co.,* 154 Cal., 165;
Weaver v. *Griffith,* 59 Atl., 315;
Vickers v. *Electro Zoning Co.,* 48 Atl., 606;
Hamburger v. *Thomas,* 118 S. W., 770.

Also

Shenners v. *Pritchard,* 104 Wisc., 291;
Dunn v. *Yakich,* 61 Pac., 926.

The above are practically all of the adjudicated cases interpreting contracts containing provisions for a forfeiture of the rights of *all parties* upon default in payment, in connection with the absolute *agreement of the purchaser to buy* the property and to pay the

price, except the case of *Ramsey* v. *West* from an intermediate court of appeal in Missouri. The case of *Williamson* v. *Hill,* cited in the opinion, as will hereafter appear, *did not contain an agreement to buy* at all, and is therefore not in point. The Ramsey case is opposed to all precedent and is also distinguishable from the case at bar as will also later appear from this petition. The group of cases above cited hold in effect, as was stated by Mr. Justice Henshaw in *Central Oil Co.* v. *Southern Refining Co.,* 154 Cal., at page 167:

> "A promise which is made conditionally upon the will of the promisor is generally of no value, for one who promises to do a thing only if he pleases to do it is not bound to perform it at all."

The rule of these cases, beginning with *Stewart* v. *Griffith,* 217 U. S., 323, is not disputed by the opinion of the Court in this case. The *Stewart* case, however, is distinguished by this Court from the case under consideration, because, as 'tis said, it was "a contract of sale of real estate." There was substantially no difference in the nature or language of the contract itself. The Court in the Stewart case determined that the purchaser did agree to buy and to pay the price. The contract provided that if the price was not paid the contract was "to be null and void and of *no effect in law.*" But, says the Court here, the contract in the Stewart case related to the sale of real estate, and the

contract in this case was a contract usual in mining sections relating to the development of mines.

We again not only respectfully contend that the meaning of the parties is to be ascertained from the language of their contracts rather than from the subject matter of their dealings, but besides that, may we direct the Court's attention to the fact that there is nothing in this contract or in the pleadings to show that the agreement with Lange and Hastings related to the development of mines or that they were investors, as the Court says, taking "the chance that upon developing the property involved he may find his hopes rewarded." In placing this contract in suit in the class of contracts described, as development contracts, the facts assumed are not in the record. And yet even in mining contracts *where the purchasers agree to buy,* they cannot be relieved from that obligation by their own default because the property has not developed as hoped for.

THE CONTRACT IN QUESTION WAS FOR CORPORATION STOCK AND NOT FOR A MINE.

In the contract with Lange and Hastings, there is nothing to show that any development of property was involved or that the payments were dependent upon any prospective development. There was no "chance to be taken." It was not an option nor a bond on a mine. It was a contract for the *purchase* and *sale* of shares of corporate stock, which does not

even indicate in any manner what proportion of the stock it represented in the corporation nor that it had any relation to the control or operation or development of a mine.

It is true, as the Court says, "abandonment and forfeiture gave Pitt and Campbell the right to their stock." We have never disputed that right, but the right did not come from the contract but arose from their ownership of the stock. It is true they had the right to take it upon the purchasers' default, but they also had the right not to take it.

While they had the right to take the stock, the exercise of that right was with Pitt and Campbell and not with Lange and Hastings, who were in default, nor with the bank.

The case may be stated in another way. Let the facts be that Lange and Hastings failed to pay the $11,250, which they agreed to pay on May 1st. Pitt and Campbell, instead of retaking the stock, sue Lange and Hastings for the amount of this payment. Could they recover? Could Lange and Hastings say, we never agreed to pay if we did not pay. Did the right of Pitt and Campbell cease upon the default, or would it cease only upon the exercise of their right to the stock?

Referring again to the nature of the contract; it related to the purchase and sale of mining stock, not a mine. Certainly there can be no difference in the construction of such a contract than if it related to any

other kind of corporate stock, as stock in a land corporation. Would there be a difference in the meaning of two contracts exactly alike in terms because one relates to land and the other to corporate stock?

We respectfully urge that the Court erred in classifying this contract as a contract relating to the development of mines where the investor takes the chance of having his hopes rewarded, or his choice of defaulting in payment and losing what he has expended.

We think the distinction asserted between this case and *Stewart* v. *Griffith* is not sound, that is, if this is not such a mining contract as described, then we think *Stewart* v. *Griffith* and the like cases referred to are authority and controlling of the issue.

The Court cites two cases, namely:

> *Ramsey* v. *West,* 31 Mo. App., 676;
> *Williamson* v. *Hill,* 27 N. E., 1008; 154 Mass., 117.

Neither of these cases arose in mining sections and neither related to mines. *Ramsey* v. *West,* like *Stewart* v. *Griffith,* was a contract of sale of real estate. Both these cases related to the same thing. The forfeiture clause was practically the same in each case and both contracts contained an express covenant to buy. The only trouble with *Ramsey* v. *West,* decided by an intermediate court of appeal in Missouri, is,

that it is in direct conflict with the Supreme Court of the United States in the Stewart case.

In *Williamson* v. *Hill* there *was no agreement to buy at all.* The plaintiff agreed to sell and the contract stated the terms and conditions of the sale, but contained no agreement by the defendant to buy. The forfeiture clause provided that if the payment was not made when demanded the contract was to be void "and the patents shall revert to Williamson."

The nature of the contracts in *Stewart* v. *Griffith* and the other cases cited, are fully set out in our opening brief at pages 27 to 36. The case from the Supreme Court of Pennsylvania, namely,

Weaver v. *Griffith,* 59 Atl., 315,

contained a provision fully as comprehensive as in this case that upon default in payment

> "The agreement is to be null and void *and all parties* are to be released from *all liabilities* hereunder and all money previously paid forfeited."

Practically the same language is found in the case of

Hamburger v. *Thomas,* 118 S. W., 770.

I call the Court's attention to one case which was not in our former brief, namely,

Shenner v. *Pritchard,* 104 Wisc., 291.

There was a provision in the contract in that case that after a forfeiture had occurred by default in payment, the contract could be revived or renewed by the parties, or by the first party, but it will be seen by an examination of the entire opinion that the case did not turn upon this point alone, but it was a construction of a contract wherein the *purchasers agreed to buy* subject to the condition that if payment were not made "this agreement shall henceforth be utterly void." After default in payment, the sellers sued for the price. It was contended by the purchasers that if they failed to make the payments, the agreement was to be "utterly void for all purposes," "and no action at law could be maintained thereon," and that

> "Thus, it would be left at the option of the vendee in the contract to terminate it at any time he saw fit, by simply failing or refusing to pay any further installments due thereon." Citing a case from 4 Atl., p. 830.

The Court says:

> "This decision is opposed to the great weight of authority, as we shall see, and has no support in reason or justice. Suppose, after the contract had been executed, the defendants became dissatisfied with their bargain, and they had refused to make the first payment; could it be claimed that they could then forfeit the contract? The forfeiture clause is that, if they fail to make the payments at the time and the manner specified

it shall be void. They agreed to pay a cash payment of $100.

"'What, then, was the meaning of the parties when they entered into this contract? Did they intend it should be a *felo de se,* or that the defendant below might make it so, or valid and operative, at his election? What inducement could the plaintiff below have had for making such a contract? The covenants of the defendant below were absolute, and on his performance the plaintiff below would have been bound; but the clause providing for a forfeiture of previous payments was totally inoperative until at least one payment made. The whole clause providing for the vendor's discharge from his covenants and the forfeiture of the vendees' payments is clearly a condition in favor of the former, not the latter. The vendee was bound to pay at all events. If he had failed, even after having made payments, the vendor might consider the contract at an end, and sell the land to another. If, however, he chooses not to do so, but holds the vendee to the contract, he has undoubted right to enforce it by compelling payment. A contrary doctrine would be allowing the vendee to take advantage of his own negligence, without any advantage to the vendor, but, rather, an injury, as he is in the meantime prohibited from selling the land to any other purchaser.'

"A review of this case leads to the conclusion that this clause in the contract leaves it for the vendor to say whether he will declare the contract void or not, and that he may elect to sue

for the unpaid purchase money or for a specific performance of the contract, or to declare the contract at an end."

We repeat that with the exception of *Ramsey* v. *West,* the authorities all agree that in contracts where the *purchaser agrees to buy,* the seller has the right to enforce payment after default. But this case possesses the additional feature that the contract clearly provides that the rights of the parties are to cease not upon the default but upon the return of the stock. If this is true, it matters not whether the stock was actually returned or not (and it will be observed that there is no evidence here that it was returned), because the liability of the defendant was not dependent upon any subsequent act of the bank. If Pitt and Campbell had a right under the contract to enforce payment, they retained that right until it was shown they lost it by themselves retaking the stock.

PRIVATE AGREEMENT WITH THE BANK WAS NOT BINDING UPON DEFENDANT NOR UPON PITT AND CAMPBELL.

Second: The agreement in question provides that the payments are to be made to the bank as the agent of Pitt and Campbell. If the arrangement with the bank for cashing plaintiff's drafts, as found by the Court, had not been made, and the draft had been mailed to the escrow holder as the agent of Pitt and

Campbell, to apply upon the payment, the mailing of the draft and the letters of instructions therewith would have been an acceptance of the offer and would have made the contract an absolute one, even if prior to that date it had been only optional. The making of the private arrangement with the bank does not in any way affect this acceptance. The pleadings, the letters, and the evidence show the draft was sent to the escrow holder to apply on the payment, without reference to any private arrangement. See Opening Brief, pages 44 to 47.

THE DEFENSE BASED UPON THE MESSAGE CONTRACT.

Third: The charge against defendant here was delay in delivery of a telegram.

The Court in its opinion holds that the stipulations on the message blank with respect to repeated messages cannot be construed to apply to the case of delay, basing its ruling chiefly upon the case of

Box v. *Postal Tel. Co.*, 165 Cal., 138.

We contend that upon the record of this case the decision in *Box* v. *Telegraph Co.* is directly in point for the defendant for this reason. As stated in the opinion in this case, page 10, referring to the Box case, this Court said:

> "The regulation of the company with respect to repeated messages while purporting to be made to guard against mistakes or delays should be

construed to refer to such mistakes and *delays as could be corrected or avoided by repetition and comparison;* otherwise a delay caused by the conduct of the company in negligently failing to send or attempt to send the message would come within the rule."

In the Box case the Court did not decide that the stipulation did not apply to delays, but on the contrary that it does apply to delays which could be corrected or avoided by repetition. What is the case here?

In the Box case the message was never sent at all. It was held by the Court, therefore, there was nothing to compare nor repeat, but on the other hand, the conduct of the company made it impossible for the message to be repeated. The case, however, held, as quoted by the Court in this case, that the stipulation does include such *"delays as could be corrected or avoided by repetition."* The delay in this case is one which a repetition would have avoided and to support this statement, we respectfully refer the Court to the findings of the District Court, Finding XV (Tr., p. 58). The message was filed at Oakland, California, to be sent to Yerington, Nevada. It was found by the Court that the message failed between Reno and Wabuska, two intermediate stations in Nevada. The message was promptly transmitted from Oakland to the first relay station at Reno. It is shown by the Agreed Statement of Facts that it reached Reno prior to hour of 9:30 p. m.

(Tr., p. 70). It was forwarded from Reno to Wabuska by the operator Collins at 9:56 (Tr., p. 120). But the Court found that it did not reach Wabuska. It failed, therefore, between these two intermediate points. If the message had been repeated from Wabuska, the repetition would have shown that the message had reached Wabuska. The failure to get a repetition from Wabuska would have shown that it did not reach that point, and the sending operator would therefore have been advised of the delay. All of the cases, including the Box case, admit that the stipulation applies to such delays as would be avoided by repetition. In the case of

> *Union Construction Co.* v. *Western Union,* 163 Cal., 298,

also cited in the opinion, the Supreme Court of California states the rule thus, at page 316:

> "For these reasons it (the stipulation) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message *from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee.*"

This is the rule followed by the Interstate Commerce Commission which by the terms of the amendment to Interstate Commerce Act, now has jurisdic-

tion to determine the reasonableness of the stipulations in the message blanks now in question. See case of

Cultra v. *Western Union,* 44 I. C. C., 679,

cited in our former brief at pages 67-71.

The case of

Western Union v. *Coggin,* 68 Fed., 137,

decided by the same Circuit which gave the opinion in the Box case, held that the telegraph company was exonerated from liability under the terms of the stipulation, although there was no error of transmission, but the loss was caused solely by *delay.* See also

Clement v. *Western Union,* 137 Mass., 463;
Birkett v. *Western Union,* 103 Mich., 363;
Stone v. *Postal Telegraph Co.,* 76 Atl., 762,

cited on pages 62 to 64 of defendant's opening brief.

The correct rule, therefore, drawn from all the cases seems to be that the stipulation includes delays which would be corrected "or avoided by repetition," but does not include delays which would not be corrected or avoided by repetition. In the Box case, the Court held that the delay involved could not have been corrected by repetition because the message was never sent at all. In *Union Construction Co.* v. *Western Union, supra,* the Court held that repetition would not have tended to correct or avoid the delay because the transmission of the message had been

completed and the delay was in the delivery at the terminal office after transmission was complete. But in this case the delay is probably the only delay which the repetition would correct and avoid, that is, a delay occurring at an intermediate point of which the sending office would be immediately advised by failure to receive the repeated message. We respectfully contend that the decision is not in accord with the authorities upon which it is based, but in effect denies the application of the stipulation to all delays whether they could have been corrected or not by the repetition of the message. In the case of *Postal Telegraph Co.* v. *Nichols,* cited in the opinion of the Court, the sending office knew of the delay but did not correct it.

THE ALLEGED ORAL CONTRACT OF INSURANCE.

Fourth: The Court holds that the defendant, for the additional consideration of 45c made an oral contract of insurance "specially to deliver the message at Yerington." Such contract defendant's agent had no authority to make, for this reason: It was necessary for the message in order to reach Yerington to be forwarded over the line of another company (see Stipulation of Facts, Tr., page 68). The stipulations upon the message blanks, subject to which the message was transmitted and by which the plaintiffs were bound, provided that the message, if necessary to be forwarded over the lines of another company, is to be so sent "without liability." In such case the agent had no

authority to make any contract of insurance of the delivery of the message either oral or written (Tr., p. 54). Plaintiffs were bound by the terms of the message contract whether they read it or not.

> *Primrose* v. *Western Union,* 154 U. S., 125;
> *Postal Telegraph Co.* v. *Nichols,* 159 Fed., 643-647.

In the case last above cited, the Court of Appeals of this Circuit, at page 647, said:

> "We attach no consequence to the testimony of Nichols (the plaintiff) to the effect that he did not read the printed matter on the front or back of the blank upon which he wrote the message and that his attention was not called to such matter."

In the case at bar, the Court, page 5 in the Statement of Facts, quotes this language:

> "The Court finds that neither Hastings nor Lange read the printed matter on the blank and did not know its terms and that the agent of the company did not call their attention to the printed matter."

We ask that this language be stricken from the opinion, as it is a finding upon an immaterial matter and one as to which this Court in the Nichols case stated, "We attach no consequence." The language, if it remains in the opinion would be misleading and result in the contention that senders of messages were

not bound by the printed matter upon the blanks of the telegraph company if they can say they did not read it and their attention was not specially called to it.

It is true that the Court found the delay occurred upon the line of the defendant and not upon the connecting line. On the question of negligence the consideration of that fact may be appropriate, but in relation to the insurance contract it matters not where the negligence occurred. The question is whether the defendant's agent had authority to make any such contract as the Court found was made. If not, the defendant is not liable for damages no matter where the negligence occurred.

We urge that under the terms of the stipulation where the message was necessarily to be forwarded over the lines of another company it was without the power of the agent of the defendant to make an oral contract of insurance.

Although there was a written contract between the parties which they are deemed to have read and consented to and by which they are bound and subject to the conditions and terms of which it was expressly agreed the message was sent, the Court holds that the plaintiffs may show they sent the message under an oral contract. If this may be done in this case, it may likewise be done in any case, and the written stipulations thus be superseded by any oral agreement made with the receiving clerk of a telegraph company which suitors may be able to establish.

GROSS NEGLIGENCE.

Fifth: The Court held that the delay of three days at Wabuska, in view of the detailed explanation to defendant's agent as to the purpose of the telegram, proved gross negligence. An unexplained delay of three days might be gross negligence, but a delay of one hour would certainly not be. We do not think it was proper for the Court to consider the time which elapsed after the money was paid. The message could not under any condition have reached Yerington before the morning of April 30th. If it was delayed until the bank opened at 8:30 or 9:00 o'clock, it would have failed of its purpose. If it were shown that the telegraph company, with all due diligence, could not have delivered the message before the bank opened, by reason of disturbance upon the lines or for any physical cause, there would have been no liability in this case because there was a delay of three days after the message should have gone through. If any liability was incurred at all, it accrued when the bank received the draft on the morning of April 30th and credited to account of Pitt and Campbell. Negligence which occurred subsequent to the loss cannot be charged against the company. If by reason of storm, or other disturbance, the message could not have reached the bank before the opening hour on April 30th, there could not possibly be any liability upon the telegraph company, even though after the draft was paid the message had been delayed for a month or not deliv-

ered at all. We respectfully contend, therefore, that the Court erred in finding gross negligence against the Company based upon the delay which occurred after the time the draft was paid, which was practically the entire three-day period.

INTEREST.

Sixth: We earnestly contend that the Court was in error in allowing interest upon the damages awarded. The Court says the real question was simply whether the defendant was originally liable for $11,250, that being the amount of the draft. But the amount of the draft was not at all the necessary measure of damage. The damage was not either "in the sum named or for nothing," as said by the Court, but may have been for any amount between the sum named and nothing, dependent upon the determination of the issues made by the pleadings as to the question of value. The Court says that no benefit of any kind accrued to the plaintiffs and there was no offset to be allowed against the loss. But the defendant pleaded facts and offered evidence to show that there was an offset and a benefit to the defendant and the question whether or not the damage was the amount of the draft or nothing, or in some other immediate sum, was a question that could be ascertained and determined only by the judgment of the Court. We are not contending that the plaintiffs were required to complete the purchase in order to determine the amount of the damage, but

we do assert that the defendants had a right to show the value of the property in order to determine what, if any, the damage was. For these reasons the Court below ruled that the damages were not *ascertained* when the alleged act of negligence accrued, but could only be *determined and fixed by the judgment of the Court* from the evidence, and it was therefore not a proper case for the allowance of interest. We think this ruling was correct.

For the reasons herein stated, we respectfully petition this honorable Court for a rehearing of this cause.

Respectfully submitted.

Beverly L. Hodghead.

Attorney for Western Union Telegraph Company,
Plaintiff in Error.

ALBERT T. BENEDICT, of New York,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is not filed for delay and in my opinion is well founded in point of law.

BEVERLY L. HODGHEAD,
Attorney for Western Union Telegraph Company,
Plaintiff in Error.

No. 3009

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. G. ARMSTRONG, F. R. CORNISH, H. HAKES, T. A. TRIMBLE, MARY E. TRIMBLE, HOMER TRIMBLE, HARRY TRIMBLE, CORA T. FAVILLE, F. F. FAVILLE and SCANDINAVIAN AMERICAN BANK OF SPOKANE, a Corporation,

Appellants,

vs.

UNION TRUST & SAVINGS BANK, a Corporation, as Receiver for FIDELITY LUMBER COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record.

CHARLES P. LUND, Old National Bank Building, Spokane, Washington, and

FAVILLE & WHITNEY, Storm Lake, Iowa,
Attorneys for Appellants,
and

HAMBLEN & GILBERT, Paulsen Building, Spokane, Washington,
Attorneys for Receiver and Appellee. [2*]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Order Appointing Permanent Receiver.

This matter coming regularly on for hearing upon the application of counsel for the above-named plaintiff, to make permanent the appointment of the Union Trust & Savings Bank as receiver of the Fidelity Lumber Company, in the consolidated cause of Continental & Commercial Trust & Savings

*Page-number appearing at foot of page of original certified Transcript of Record.

Bank, a Corporation, et al., Trustees, Plaintiffs, vs. Fidelity Lumber Company, a Corporation, Defendant, and S. H. Bowman Lumber Company, a Corporation, Plaintiff, vs. Fidelity Lumber Company, a Corporation, Defendant; and it appearing to the Court that the above-named defendant has filed herein a confession of the bills of complaint in said causes; that the receiver heretofore appointed by this Court immediately upon its appointment took possession of the property and assets of said defendant, and ever since said time has maintained said possession; that no objection has been made to or filed against the permanent appointment of a receiver herein; now on motion of counsel;

It is ORDERED, ADJUDGED and DECREED, that the Union Trust & Savings Bank, a corporation, of Spokane, Washington, organized under the laws of the State of Washington relating to Trust Companies and authorized to act as receiver of corporations, be and it is hereby appointed permanent receiver of said Fidelity Lumber Company, defendant above named, with all the powers and duties of a receiver in chancery, and with full power and authority to take, hold **[3]** possession of and preserve all of the property and assets of every kind and description belonging to said Fidelity Lumber Company; to marshal the liens against said property; to ascertain all debts and obligations of said company; and to bring to sale in the due course of administration of said trust, all the property and assets of said defendant as may be ordered by the Court from time to time.

It is further ORDERED that all income and earnings from the mill and other property described in the trust deed set forth in the original bill of complaint herein shall be held by said receiver in a separate fund for the benefit of the trustees in said trust deed until the further order of the Court, and that in the event the plant of said defendant shall be operated by said receiver, then there shall be retained by said receiver out of moneys received from the sale of assets, over and above the amount of valid and existing liens against the same, such a sum as the Court may adjudge reasonable as compensation to the trustees under the trust deed above mentioned for the use of said plant.

It is further ORDERED that said receiver be and it is hereby fully authorized and empowered to demand, sue for, collect, receive and take into its possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books and papers, choses in action, and property of every kind and description of said defendant corporation and wheresoever situated or located, and to institute and prosecute within this state, or elsewhere and in its name as receiver, or in the name of the defendant company, as it may be advised by counsel, all such suits for the recovery or protection of any estate, property, damages, or demands existing in favor of the said defendant company, and likewise to defend, compromise or settle all such suits instituted against it as receiver, and also to appear in and conduct, prosecute or defend any action or proceeding now pending or which may here-

after be brought in any court to which the defendant company is or shall be a party. [4]

It is further ORDERED that said receiver be and it is hereby authorized and directed as soon as practicable to cause to be prepared a schedule of all and singular the property, rights and assets which may come into its possession as such receiver, and to file same with the clerk of this Court, and said receiver is hereby directed to keep true and correct account of all income, earnings and revenue of said property held under its control as such receiver, and of the expenses of operating such property, and to make reports of its doings as receiver from time to time as the Court may direct.

The right is reserved to the parties hereto to apply to the Court for any further or other directions to the said receiver, and this Court reserves the full right and jurisdiction to make from time to time such further orders modifying, extending, limiting or in otherwise modifying or changing this order as to it at any time may seem best.

It is further ordered that said receiver having given a bond in the sum of $25,000, that no further or other bond be required of it.

Done in open court this 7th day of June, A. D. 1915.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Appointing Permanent Receiver. Filed June 7, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [5]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,

Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,

Defendant.

Receiver's Report of Claims Filed.

Comes now the Union Trust & Savings Bank, the duly appointed, qualified and acting receiver of the Fidelity Lumber Company, a corporation, and submits the following report of all claims presented to it as receiver, and represents to the Court:

1. That on the 17th day of June, 1915, this Court made and entered an order directing your receiver to notify all creditors of the Fidelity Lumber Company to present their claims, duly verified, to your receiver within ninety (90) days from and after notice, and that pursuant to said order your receiver caused to be mailed to all creditors then known to your receiver at their last known address, a notice as more fully appears from the affidavit of mailing such notice, on file herein.

2. That there has been presented to your receiver, from time to time, claims duly verified, as set forth in Schedules "A," "B," "C" and "D,"

hereto attached and made a part of this report, and that your receiver has proceeded to carefully investigate and audit each of said claims for the purpose of determining whether or not the same should be allowed.

3. Schedule "A," hereto attached, contains a complete list of all preferred or lienable claims which have been filed with your receiver, and which have been allowed and paid. These represent claims for labor, logs, etc., involving current operations of the [6] Fidelity Lumber Company immediately prior to the receivership. Each of said claims was carefully investigated before payment, and in the judgment of your receiver it was essential to the integrity of the trust to pay such claims to avoid the filing of liens and the accumulation of costs.

4. Schedule "B," hereto attached, contains a statement of all claims filed and allowed in whole or in part, but not paid by the receiver.

5. Schedule "C," hereto attached, contains a statement of claims which are based upon preferred or common stock of the Fidelity Lumber Company, or preferred certificates of said company, so called, or growing out of the redemption of such stock or certificates, which claims have not been allowed by your receiver for the reason that your receiver and its solicitors have been unable to determine whether or not such claims are properly allowable. In some instances the claims of these creditors represent credits which were given to stockholders by the

Fidelity Lumber Company through the redemption, or attempted redemption of preferred stock, or preferred certificates. The question which the Court will be called upon to decide, in brief, is whether or not the holders of this stock, or of these preferred certificates, so called, are creditors or stockholders.

6. Schedule "D," hereto attached, contains a statement of the Bruce-Edgerton Lumber Company claims. Under this heading have been grouped the claims of F. A. Chamberlain, trustee for certain creditors of the Bruce-Edgerton Lumber Company for $83,880.00; the claim of the Old National Bank for $15,665.54; and the claim of the Bruce-Edgerton Lumber Company for $20,597.77.

The claim of F. A. Chamberlain, as Trustee, covers notes of the Fidelity Lumber Company amounting to $80,000.00, together with interest, payable to the Bruce-Edgerton Lumber Company and by it assigned to the present holder.

The claim of the Old National Bank for $15,665.54 covers [7] three notes of the Bruce-Edgerton Lumber Company payable to the Fidelity Lumber Company and indorsed by the latter, and discounted at the Old National Bank.

Against the aggregate of $120,143.31, here referred to, your receiver is prepared to allow $75,782.01.

These claims are mutually involved to such an extent that your receiver is unable to determine how the credit allowed should be segregated to the respective claims, and therefore suggests that the par-

ties in interest mutually settle this matter or else establish their rights upon the hearing of this report.

7. In connection with the claims of the Old National Bank, your receiver calls attention to an agreement in writing dated October 17th, 1913, whereby the Bruce-Edgerton Lumber Company. O. H. Montzheimer, A. Montzheimer, and C. H. Stone, jointly and severally agreed that any indebtedness at any time due the Old National Bank shall have priority over any indebtedness due the signers of said agreement, and shall be paid first out of any assets of the Fidelity Lumber Company. It is understood by your receiver that F. A. Chamberlain, Trustee, as assignee of a portion of the indebtedness due the Bruce-Edgerton Lumber Company, contests the validity of this agreement, and your receiver believes that the question of the priority of the claims of the Old National Bank to payment as against the signers of said agreement, should be determined upon the hearing of this report.

WHEREFORE, your receiver prays as follows:

1. That the Court fix a day for hearing upon this report, and direct that a proper notice thereof be given to each creditor whose names appears in Schedules "B," "C" and "D."

2. That upon said hearing the Court approve the payment of all claims set forth in Schedule "A" and allow all claims set forth in Schedule "B" as allowed and approved by your receiver.

3. That all creditors referred to in Schedule "C" herein [8] be required to appear upon said hearing and show cause if any they have why their claims as filed with your receiver should be allowed either in whole or in part.

4. That the creditors referred to in Schedule "D" hereto attached be required to appear upon said hearing and show cause, if any they have, why their claims in the aggregate should be allowed for more than the amount allowed by the receiver, and further what amount each of said creditors is entitled to.

5. That the parties to the agreement referred to in this petition, granting a priority to the Old National Bank, be required to appear upon said hearing and show cause if any they have why said agreement should not be recognized and enforced.

6. That any creditors named in Schedules "B," "C" and "D," hereto attached, be required to file any objection or exceptions he may have to the foregoing report, or any part thereof, at least ten (10) days prior to said hearing.

(Signed) HAMBLEN & GILBERT,
Solicitors for Receiver.

State of Washington,
County of Spokane,—ss.

W. J. Kommers, being first duly sworn, on oath deposes and says: That he is an officer of the Union Trust & Savings Bank, to wit, its vice-president, and makes this verification in its behalf; that he has read the foregoing petition, knows the contents thereof

and that the same is true as he verily believes.

(Signed) W. J. KOMMERS.

Subscribed and sworn to before me this 4th day of March, 1916.

[Seal] (Signed) W. S. GILBERT,

Notary Public, Residing at Spokane, Spokane County, Washington. **[9]**

Schedule "A."

LIST OF PREFERRED OR LIENABLE CLAIMS FILED WITH RECEIVER, ALLOWED AND PAID.

Names, Addresses, Amounts Claimed and Amounts Allowed and Paid omitted.

Schedule "B."

STATEMENT OF CLAIMS FILED AND ALLOWED IN WHOLE OR IN PART (BUT NOT PAID) BY RECEIVER.

Names, Addresses, Amounts Claimed and Amounts Allowed omitted. **[10]**

Schedule "C."

STATEMENT OF CLAIMS BASED UPON PREFERRED OR COMMON STOCK OR PREFERRED CERTIFICATES, SO-CALLED, OR GOING OUT OF THE REDEMPTION OF SUCH STOCK OR CERTIFICATES AND NOT ALLOWED BY RECEIVER.

Name.	Address.	Amount Claimed.	
Armstrong, S. G.	Cedar Rapids, Ia.	17133.00	
Bose, Dora M.	Racine, Wis.	350.23	
Bose, H. W.	" "	350.23	
Boyer, J. F.	Los Angeles, Cal.	2320.29	
Bruce, W. J.	Minneapolis, Minn.	1467.18	1467.18
Carter, C. W.	Pasadena, Cal.	2837.86	
Carter, Mrs. Merriam		9524.14	
Cornish, F. R.	Cedar Rapids, Ia.)		
	)	26349.32	
Cornish, Susan C.	" " ")		
Faville, Cora T.	Storm Lake, Ia.	2666.46	
Faville, F. F.	" " "	7912.50	
Hakes, M.	Laurens, Iowa	25667.41	
Hillock, Grace E.	Webster City, Ia.	548.70	
Jacobson, J. C.	Seattle, Wash.	937.17	
Leighton, Mary E.	Pasadena, Cal.	496.12	
Long, S. K.	Newport, Wash,	197.90	
McDonald, W. W.	Medford, Ore.	1145.33	
McDonald & Son, W. W.	" " (	1288.50	
	(	5522.22	5455.55
Montzheimer, A.	Joliet, Ill.	2791.53	
Montzheimer, O. H.	Primghar, Iowa	95.80	95.80
Montzheimer, Ruby F.	Newport, Wash.	583.71	
Nelson, Josephine Horton,	Garfield, Wash.	233.48	
Richardson, Hattie E.	Webster City, Ia.	594.30	
Scandinavian American Bank	Spokane, Wash.	5000.00	
Smith, N. A.	Minneapolis, Minn.	1222.40	
Stone, C. H.	Clayton, Ga.	2323.30	2300.70
Torreson, Geo.	Newport, Wash.	2801.80	
Temple, Anna S.	Spokane, Wash.	1088.88	
Willis, A. G.	" "	735.45	
Willis, B. L.	" "	1399.35	

Schedule "D."

STATEMENT OF CLAIMS OF BRUCE-EDGERTON LUMBER COMPANY, ET AL.

Name.	Address.	Amount Claimed.	Amount Allowed.
Bruce-Edgerton Lbr. Co.	Minneapolis, Minn.	(20597.77	
Chamberlain, F. A., Trustee		(	
for the creditors of the		(	
Bruce-Edgerton Lbr. Co.	" "	(83880.00	75782.01
Old National Bank	Spokane, Wash.	15665.54	

[Endorsements]: Receiver's Report of Claims Filed. Filed March 4, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[12]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Objections of S. G. Armstrong to Report of Receiver.

Comes now S. G. Armstrong, a claimant in the above-entitled matter, and in pursuance to an order of Court heretofore entered in said matter, hereby makes the following objections to the report of the receiver and to the classification of the claims of this claimant as shown in said report:

First: This claimant respectfully shows the Court that his claim for one note of $156.00 with interest at 6% from December 30th, 1911, is a *bona fide,* valid and genuine indebtedness of the said company of the same kind and character as the claims listed, filed and approved by the said receiver under Schedule "B," and is for money actually due from the said Fidelity Lumber Company to this claimant.

Second: This claimant and objector further shows to the Court that the said item in his claim of $2,500.00 is for a certain note dated October 30th, 1914, is for money actually loaned by this claimant to the said Fidelity Lumber Company, and that said note bears interest at 8% per annum and that no interest has been paid thereon, and your objector shows to the Court that the said obligation is of the same kind and character as the claims filed and allowed by the said receiver under Schedule "B" of the said report.

Third: This claimant further shows to the Court that **[13]** his claim for six (6) shares of preferred stock under certificate #37 is for preferred stock, which the said Fidelity Lumber Company, by special agreement attached to the said certificate, undertook and agreed to redeem on the 1st day of December, 1913, and that the five (5) shares of preferred stock represented by certificate #38 in said claim was also stock which the said Fidelity Lumber Company by special agreement also undertook and agreed to redeem on the 1st day of Decem-

ber, 1913, and as to the said stock represented by the two certificates #37 and 38, this claimant asks that the same be established and allowed by the Court on the same basis and in the same manner as other stock of the said Fidelity Lumber Company of the same issue and bearing the same endorsement.

Fourth. Another claim of this claimant is for twenty-six (26) shares of the preferred stock of the said Fidelity Lumber Company dated the 30th day of December, 1911, which this claimant asks may be established and allowed by the Court on the same basis as other claims for preferred stock. This claimant also shows to the Court that as part of his claim is certificate #17 for one hundred (100) shares of the common stock of the said Fidelity Lumber Company dated November 20th, 1905, and as to said item this claimant asks that the same may be established and allowed on the same basis as other similar shares of the common stock of the said company.

WHEREFORE this claimant respectfully prays the Court that an order may be entered directing that the said two claims of this claimant, represented by the said notes of the said Fidelity Lumber Company, and each of them, may be established by the Court as claims of the same kind and character as those reported by the receiver in Schedule "B," and that the claims of this claimant for preferred shares of stock issued under special agreement for redemption thereof may be established by the Court as claims against the said company on the same basis and of the same character as other claims [14] of

the said issue and supported by the said contract of the said Fidelity Lumber Company agreeing to redeem the same; and that the claims of this claimant for preferred stock and for common stock may all be established by the Court on the same basis as other similar stock of the said company, and that the Court may make all such other and further orders in said matter as may be proper and equitable and as may fully protect the rights of this claimant.

(Signed) S. G. ARMSTRONG,
By F. F. FAVILLE,
Attorney for Claimant.

[Endorsements]: Objections of S. G. Armstrong to Report of Receiver. Filed in the U. S. District Court for the Eastern District of Washington. May 1, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [15]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Objections of M. Hakes to Report of Receiver.

Comes now the claimant, M. Hakes, in the above-

entitled matter, and in pursuance of the order of the Court heretofore entered in said matter makes the following objections to the report of the said receiver and to the classification of the claims of this claimant as shown in said report for the following reasons and upon the following grounds, to wit:

First. This claimant shows to the Court that items II and III of the proof of claim filed by this claimant with the receiver are not only based on seventeen shares of the preferred stock in the defendant company, but upon the special written contract of said defendant company attached to and made a part of said claim, by the terms of which said written contract the said company obligated and bound itself to redeem said stock on the first day of December, 1913, by paying the par value of the same to the holder, together with all unpaid accrued interest, and that the said items of the said claim of this claimant are based upon the said written contract binding the said defendant company to pay the par value of the said stock on the said 1st day of December, 1913.

This claimant respectfully shows to the Court that the said shares of stock and said written contract constitute the obligation of the said company to pay the amount of the said stock, with interest thereon, the same as any other written obligation of [16] the company as for money loaned to the said defendant company, and that this claimant is entitled to have the said items of this said claim established as a claim under Schedule "B" instead of under Schedule "C."

Second. This claimant respectfully shows to the Court that item IV of the claim filed by this claimant is for a note executed by the said defendant company for a *bona fide* indebtedness actually due from the said defendant company to this claimant for money actually loaned by this claimant to the said defendant company, and that said note and interest thereon are in no way a part of the claims scheduled under Schedule "C," but the said item of said claim is of the same character as the obligations of the defendant company set forth in Schedule "B" of said receiver's report and that the same should be classified and allowed as such.

Third. This claimant respectfully shows to the Court that item V of the claim filed by this claimant is for a note executed by the said defendant company for a *bona fide* indebtedness actually due from the said defendant company to this claimant, and that said note and interest thereon are in no way a part of the claims scheduled under Schedule "C," but the said item of the said claim is of the same character as the obligations of the defendant company set forth in Schedule "B" of said receiver's report and that the same should be classified and allowed as such.

Fourth. That the said item VI of the claim of this claimant is for interest on $1,700.00 from April 24th, 1914, to October 24th, 1914, at 8%. The said $1,700.00 having been money actually loaned by said claimant to said defendant company and the said interest having accrued thereon under and by virtue of the terms of the said loan which were evidenced by the promissory note, and which said note was re-

newed as shown in item IV of said claim, but the said interest was never paid. [17]

Fifth. As to item I of the claim of this claimant he respectfully shows to the Court that the terms of the contract between the defendant company and this claimant are as shown in the certificates of stock attached to said claim, and that said certificates of stock were issued in pursuance of a resolution of the defendant company providing that "the company shall guarantee a payment of 7% per annum on the said preferred stock which interest shall be payable semi-annually on the 1st day of January and July of each year." That by the terms of the said resolution and of the said certificates of stock issued in pursuance thereof the said certificates represent a valid and binding obligation and guaranty on the part of the said defendant company to pay interest on the amounts of the face of the said certificates at 7% per annum, semi-annually, and this claimant is entitled to have the said interest so accrued and also the amount of the face of the said certificates of stock established as a claim against the said company under Schedule "B," and on the same basis and footing as the claims listed in said schedule.

WHEREFORE this claimant prays the Court that an order will be entered requiring the receiver to list and classify the said filed claims of this claimant and each of them or such of them as to the Court, upon showing, may seem just, legal and proper, as valid and subsisting claims against the said company and as of the same kind and character as the claims reported and classified by the receiver under Sched-

ule "B" in said report, and that the Court may make all such other and further orders in regard thereto as many be proper in the premises.

(Signed) M. HAKES.
By F. F. FAVILLE,
His Attorney.

[Endorsements]: Objections of M. Hakes to Report of Receiver. Filed in the U. S. District Court for the Eastern District of Washington. April 7, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [18]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Objections of T. A. Trimble to Report of Receiver.

Comes now T. A. Trimble, a claimant in the above-entitled matter, and in pursuance to an order of Court heretofore entered in said matter, hereby makes the following objections to the report of the receiver and to the classification of the claims of this claimant as shown in said report:

First: This claimant shows to the Court that his

claim for five (5) shares of preferred stock under certificate #34 is for preferred stock which the said Fidelity Lumber Company, by special agreement attached to said certificate undertook and agreed to redeem on the 1st day of December, 1913, and this claimant asks that the same be established and allowed by the Court on the same basis and in the same manner as other stock of the said Fidelity Lumber Company of the same issue and bearing the same endorsement.

Second: This claimant shows to the Court that his claim for ten (10) shares of the preferred stock under certificate #128 is for preferred stock which the said Fidelity Lumber Company by special agreement attached to said certificate undertook and agreed to redeem on the 1st day of January, 1916, and this claimant asks that the same be established and allowed by the Court on the same basis and in the same manner as other stock of the said Fidelity Lumber Company of the same issue and bearing the same endorsement.

Third: This claimant further shows the Court that his [19] claim for eleven (11) shares of preferred stock under certificate #190 is for preferred stock which the said Fidelity Lumber Company by special agreement attached to said certificate undertook and agreed to redeem on the 1st day of December, 1916, and this claimant asks that the same be established and allowed by the Court on the same basis and in the same manner as other stock of the said Fidelity Lumber Company of the same issue and bearing the same indorsement.

WHEREFORE this claimant respectfully prays the Court that the claims of this claimant for preferred shares of stock issued under special agreement for redemption thereof may be established by the Court as claims against the said company on the same basis and of the same character as other claims of the said issue and supported by the said contract of the said Fidelity Lumber Company agreeing to redeem the same, and that the Court may make all such other and further orders in said matter as may be proper and equitable and as may fully protect the rights of this claimant.

(Signed) FAVILLE & WHITNEY,
Attorneys for Claimant.

SPECIAL AGREEMENT.

For value received the Fidelity Lumber Company, a corporation of the State of Washington, hereby agrees with T. A. Trimble, the owner thereof to redeem on December 1st, 1916, at par and accrued interest, Preferred Certificate of Stock #190 for eleven (11) shares of the Preferred Stock of the Fidelity Lumber Company.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

Dated at Newport, Washington, June 22d, 1912.
Spokane, Washington.

By this SPECIAL AGREEMENT, made this first day of July, 1909, the Fidelity Lumber Company of Spokane, Washington, does hereby agree to redeem on the first day of December, 1913, Preferred Certificate of Stock dated July 1st, 1909, being certificate No. 34 for 5 shares, by paying the Par Value of same

to holder thereof, together with all unpaid accrued interest; the surrender of said certificate with this special contract to be made to the company at the time payment is received. But the holder of said certificate may at his option retain the same and receive all benefits, [20] until maturity, by surrendering this special contract to the company for cancellation.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

AGREEMENT.

Newport, Washington, March 23d, 1911.

By this special agreement the Fidelity Lumber Company, a corporation in the State of Washington, does hereby agree to redeem on the first day of January, 1916, Preferred Certificate of Stock, dated January 1st, 1911, being certificate #128 for 10 shares, by paying the par value of the same to the holder, together with all unpaid accrued interest. The surrender of said certificate with this special contract to be made to the Fidelity Lumber Company at the time payment *if* received.

The holder of this certificate may at his option return the same and receive all benefits until maturity by surrendering this special contract for cancellation.

[Seal] FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

[Endorsements]: Objections of T. A. Trimble to Report of Receiver. Filed in the U. S. District Court for the Eastern District of Washington. June 10, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [21]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,

Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,

Defendant.

Objections of Mary A. Trimble to Report of Receiver.

Comes now Mary A. Trimble, a claimant in the above-entitled matter, and in pursuance to an order of Court heretofore entered in said matter, hereby makes the following objections to the report of the receiver:

First: This claimant respectfully shows to the Court that her claim for four (4) shares of preferred stock under certificate #118 is for preferred stock which the said Fidelity Lumber Company by special agreement attached to the said certificate undertook and agreed to redeem on the 1st day of December, 1913, and that the seven (7) shares of preferred stock represented by certificate #36 in said claim is also stock which the said Fidelity Lumber Company by special agreement also undertook and agreed to redeem on the 1st day of December, 1913, and as to the said stock represented by certifi-

cates #36 and #118 this claimant asks that the same be established and allowed by the Court on the same basis and in the same manner as other stock of the said Fidelity Lumber Company of the same issue and bearing the same endorsement.

Second: This claimant further shows to the Court that her claim for ten (10) shares of preferred stock under certificate #129 is for preferred stock which the said Fidelity Lumber Company by special agreement attached to said certificate undertook and agreed to redeem on the 1st day of January, 1916, and that the ten (10) [22] shares of preferred stock represented by certificate #130 in said claim is also stock which the said Fidelity Lumber Company by special agreement also undertook and agreed to redeem on the 1st day of January, 1916, and that the ten (10) shares of preferred stock represented by certificate #131 in said claim is also stock which the said Fidelity Lumber Company by special agreement also undertook and agreed to redeem on the 1st day of January, 1916, and that the ten (10) shares of preferred stock represented by certificate #132 in said claim is also stock which the said Fidelity Lumber Company by special agreement also undertook and agreed to redeem on the 1st day of January, 1916, and as to the said stock represented by the four certificates #129, 130, 131 and 132, by this claimant asks that the same be established and allowed by the Court in the same manner and on the same basis as other stock of the said Fidelity Lumber Company of the said issue and bearing the same endorsement.

Third: This claimant further shows the Court

that her claim for one hundred and eighteen (118) shares of preferred stock under certificate #158 is for preferred stock which the said Fidelity Lumber Company, by special agreement attached to the said certificate, undertook and agreed to redeem on the 1st day of December, 1916, and this claim asks that the same be established and allowed by the Court on the same basis and in the same manner as other stock of the said Fidelity Lumber Company of the same issue and bearing the same indorsement.

WHEREFORE this claimant respectfully prays the Court that the claims of this claimant for preferred shares of stock issued under special agreement for redemption thereof may be established by the Court as claims against the said company on the same basis and of the same character as other claims of the said issue and supported by the said contract of the said Fidelity Lumber Company agreeing to redeem the same, and that the Court may make all such other and further orders in said matter as may be proper and [23] equitable and as may *full* protect the rights of this claimant.

(Signed) FAVILLE & WHITNEY,
Attorneys for Claimant.

AGREEMENT.

Newport, Washington, March 23, 1911.

By this special agreement the Fidelity Lumber Company, a corporation in the State of Washington, does hereby agree to redeem on the first day of January, 1916, Preferred Certificate of Stock dated January 1st, 1911, being Certificate No. 131 for 10 shares, by paying the par value of the same to the

holder, together with all unpaid accrued interest. The surrender of said certificate with this special contract to be made to the Fidelity Lumber Company at the time payment is received.

The holder of this certificate may at her option return the same and receive all benefits until maturity by surrendering this special contract for cancellation.

[Seal] FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

AGREEMENT.

Newport, Washington, March 23, 1911.

By this special agreement the Fidelity Lumber Company, a corporation in the State of Washington, does hereby agree to redeem on the first day of January, 1916, Preferred Certificate of Stock, dated January 1st, 1911, being Certificate No. 132 for 10 shares, by paying the par value of the same to the holder, together with all unpaid accrued interest. The surrender of said Certificate with this special contract to be made to the Fidelity Lumber Company at the time payment is received.

The holder of this Certificate may at her option return the same and receive all benefits until maturity by surrendering this special contract for cancellation.

[Seal] FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

AGREEMENT.

Newport, Washington, March 23, 1911.

By this special agreement the Fidelity Lumber

Company, a corporation in the State of Washington, does hereby agree to redeem on the first day of January, 1916, Preferred Certificate of Stock, dated January 1st, 1911, being Certificate No. 129, for 10 shares, **[24]** by paying the par value of the same to the holder, together with all unpaid accrued interest. The surrender of said certificate with this special contract to be made to the Fidelity Lumber Company at the time payment is received.

The holder of this certificate may at her option return the same and receive all benefits until maturity by surrendering this special contract for cancellation.

[Seal] FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

AGREEMENT.

Newport, Washington, March 23d, 1911.

By this special agreement the Fidelity Lumber Company, a corporation in the State of Washington, does hereby agree to redeem on the first day of January, 1916, Preferred Certificate of Stock, dated January 1st, 1911, being Certificate No. 130, for 10 shares, by paying the par value of the same to the holder, together with all unpaid accrued interest. The surrender of said Certificate with this special contract to be made to the Fidelity Lumber Company at the time payment is received.

The holder of this Certificate may at her option return the same and receive all benefits until matur-

ity by surrendering this special contract for cancellation.

[Seal] FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

SPECIAL AGREEMENT.

For value received the Fidelity Lumber Company, a corporation of the State of Washington, hereby agrees with Mary A. Trimble the owner thereof to redeem on December 1st, 1916, at par and accrued interest, Preferred Certificate of Stock #158 for one hundred and eighteen (118) shares of the Preferred Stock of the Fidelity Lumber Company.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

Dated at Newport, Washington, November 18th, 1911.

Spokane, Washington.

By this SPECIAL AGREEMENT made this first day of July, 1909, the Fidelity Lumber Company of Spokane, Washington, does hereby agree to redeem on the first day of December, 1913, Preferred Certificate of Stock dated July 1st, 1909, being certificate #36 for 7 shares, by payin*t* the par value of same to the holder together with all unpaid accrued interest; the surrender of said certificate with this special contract to be made to the company at the time payment is received. But the holder of said certificate may at her option retain the same and receive all benefits, until maturity, by **[25]** sur-

rendering this special contract to the company for cancellation.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, President.
Spokane, Washington.

By this SPECIAL AGREEMENT, made this 24th day of January, A. D. 1910, the Fidelity Lumber Company of Spokane, Washington, does agree to redeem on the first day of December, 1913, preferred certificate of stock dated January 24th, 1910, being Certificate No. 118, for four shares, by paying the par value of same to holder, together with all unpaid accrued interest; the surrender of said certificate with this special contract to be made to the company at the time payment is received. But the holder of said certificate may at her option retain the same and receive all benefits, until maturity, by surrendering this special contract to the Company for cancellation.

FIDELITY LUMBER COMPANY,
By A. J. WILSON, Secretary.

[Endorsements]: Objections of Mary A. Trimble to Report of Receiver. Filed in the U. S. District Court for the Eastern District of Washington. June 10, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[26]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,

Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,

Defendant.

Objections of Homer and Harry Trimble to Report of Receiver.

Come now the claimants Homer and Harry Trimble in the above-entitled matter and in pursuance of the order of the Court heretofore entered in said matter make the following objections to the report of the said receiver for the following reasons and upon the following grounds, to wit:

First: These claimants show to the Court that their claim is for two shares of the preferred stock of the said Fidelity Lumber Company dated the 17th day of November, 1911, numbered 154 and 155, which these claimants ask may be established and allowed by the Court on the same basis as other claims for preferred stock.

WHEREFORE these claimants respectfully pray the Court that the claim of these claimants for preferred shares of stock may be established by the

Court on the same basis as other similar stock of the said company, and that the Court may make all such other and further orders in said matter as may be proper and equitable and as may fully protect the rights of these claimants.

(Signed) FAVILLE & WHITNEY,
Attorneys for Claimants.

[Endorsements]: Objections of Homer and Harry Trimble to Report of Receiver. Filed in the U. S. District Court for the Eastern District of Washington, June 10, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [27]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Objections of Cora T. Faville to Report of Receiver.

Comes now the claimant, Cora T Faville, in the above-entitled action, and in pursuance of the order of the Court heretofore entered in said matter makes the following objections to the report of the said receiver and to the classification of the claims of

this claimant as shown in said report for the following reasons and upon the following grounds, to wit:

First: This claimant shows to the Court that item II of the proof of claim filed by this claimant with the receiver is not only based on five shares of the preferred stock in the defendant company, but upon the special written contract of said defendant company attached to and made a part of said claim, by the terms of which said written contract the said company obligated and bound itself to redeem said stock on the 1st day of December, 1913, by paying the par value of the same to the holder, together with all unpaid accrued interest and that the said item of the said claim of this claimant is based upon the said written contract binding the said defendant company to pay the par value of the said stock on the said 1st day of December, 1913, and upon the written demand of this claimant made on the said company on the said 1st day of December, 1913, that the said contract should be performed by the said defendant company. **[28]**

This claimant respectfully shows to the Court that the said shares of stock and said written contract constitute the obligation of the said company to pay the amount of the said stock with interest thereon the same as any other written obligation of the company as for money loaned to the said defendant company, and that this claimant is entitled to have the said item of this said claim established as a claim under Schedule "B" instead of under Schedule "C."

Second: This claimant respectfully shows to the Court that item III of the claim filed by this claimant is for a note executed by the said defendant company for a *bona fide* indebtedness actually due from the said defendant company to this claimant and that said note and interest thereon are in no way a part of the claims scheduled under Schedule "C," but the said item of said claim is of the same character as the obligations of the defendant company set forth in Schedule "B" of said receiver's report and that the same should be classified and allowed as such.

Third: As to item I of the claim of this claimant, she respectfully shows to Court that the terms of the contract between the defendant company and this claimant are as shown in the certificates of stock attached to said claim, and that said certificates were issued in pursuance of a resolution of the defendant company providing that "the company shall guarantee a payment of 7% per annum on the said preferred stock, which interest shall be payable semi-annually on the 1st day of January and July each year." That by the terms of the said resolution and of the said certificates of stock issued in pursuance thereof the said certificates represent a valid and binding obligation and guaranty on the party of the said defendant company to pay interest on the amounts of the face of the said certificates at 7% per annum, semi-annually, and this claimant is entitled to have the said interest so accrued and also the amount of the face of the said certificates

of stock established as a claim against the said company under Schedule "B" and on the same basis [29] and footing as the claims listed in said schedule.

WHEREFORE this claimant prays the Court that an order will be entered requiring the receiver to list and classify the said filed claims of this claimant and each of them or such of them as to the Court, upon showing, may seem just, legal and proper, as valid and subsisting claims against the said company and as of the same kind and character as the claims reported and classified by the receiver under Schedule "B" in said report, and that the Court may make such other and further orders in regard thereto as may be proper in the premises.

(Signed) CORA T. FAVILLE,
Claimant.

[Endorsements]: Objections of Cora T. Faville to Report of Receiver. Filed in the U. S. District Court for the Eastern District of Washington. April 17, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [30]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,

Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,

Defendant.

Objections of F. F. Faville to Report of Receiver.

Comes now the claimant F. F. Faville in the above-entitled matter and in pursuance of the order of the Court heretofore entered in said matter makes the following objections to the report of the said receiver and to the classification of the claims of this claimant as shown in said report, for the following reasons and upon the following grounds, to wit:

First. This claimant shows to the Court that item II of the proof of claim filed by this claimant with the receiver is not only based on five shares of the preferred stock in the defendant company but upon the special written contract of said defendant company attached to and made a part of said claim, by the terms of which said written contract the said company obligated and bound itself to redeem said stock on the 1st day of December, 1913, by paying the par value of the same to the holder,

together with all unpaid accrued interest and that the said item of the said claim of this claimant is based upon the said written contract binding the said defendant company to pay the par value of the said stock on the said 1st day of December, 1913, and upon the written demand of this claimant made on the said company on the said 1st day of December, 1913, that the said contract should be performed by the said defendant company. **[31]**

This claimant respectfully shows to the Court that the said shares of stock and said written contract constitute the obligation of the said company to pay the amount of the said stock with interest thereon the same as any other written obligation of the company as for money loaned to the said defendant company, and that this claimant is entitled to have the said item of this said claim established as a claim under Schedule "B" instead of under Schedule "C."

Second. This claimant respectfully shows to the Court that Item III of the claim filed by this claimant is for a note executed by the said defendant company for a *bona fide* indebtedness actually due from the said defendant company to this claimant and that said note and interest thereon are in no way a part of the claims scheduled under Schedule "C," but the said item of said claim is of the same character as the obligations of the defendant company set forth in Schedule "B" of said receiver's report and that the same should be classified and allowed as such.

Third: As to item I of the claim of this claimant

he respectfully shows to the Court that the terms of the contract between the defendant company and this claimant are as shown in the certificates of stock attached to said claim, and that said certificates of stock were issued in pursuance of a resolution of the defendant company providing that "the company shall guarantee a payment of 7% per annum on the said preferred stock, which interest shall be payable semi-annually on the 1st day of January and July of each year." That by the terms of the said resolution and of the said certificates of stock issued in pursuance thereof, the said certificates represent a valid and binding obligation and guaranty on the part of the said defendant company to pay interest on the amount of the face of the said certificates at 7% per annum, semi-annually, and this claimant is entitled to have the said interest so accrued and also the amount of the face of the said certificates of **[32]** stock established as a claim against the said company under Schedule "B" and on the same basis and footing as the claims listed in said schedule.

WHEREFORE this claimant prays the Court that an order will be entered requiring the receiver to list and classify the said filed claims of this claimant and each of them or such of them as to the Court upon showing may seem just, legal and proper, as valid and subsisting claims against the said company and as of the same kind and character as the claims reported and classified by the receiver under Schedule "B" in said report, and that the Court

may make all such other and further orders in regard thereto as may be proper in the premises.

(Signed) F. F. FAVILLE,
Claimant.

[Endorsements]: Objections of F. F. Faville to Report of Receiver. Filed in the U. S. District Court for the Eastern District of Washington. April 17, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[33]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Statement of Facts.

Be it remembered that heretofore, to wit, on the 8th day of May, A. D. 1916, this cause came on for hearing before the Honorable FRANK H. RUDKIN, Judge of said court, presiding.

Present: W. S. Gilbert, on behalf of the receiver. Messrs. John E. Orr, J. B. Campbell, F. F. Faville, C. P. Lund and D. W. Hurn on behalf of certain creditors.

And thereupon the following proceedings were had, to wit:

Mr. GILBERT.—I think there ought to be no objection to my stating the facts that have been agreed upon in this case.

Mr. FAVILLE.—No.

Mr. GILBERT.—This company, your Honor, was incorporated under the laws of this State in 1904. The original capital was $100,000, of which $50,000 was to be preferred, at the option of the company.

On February 3d, 1906, the stockholders at a meeting passed a resolution increasing the capital to $400,000, of which $100,000 was preferred, with optional redemption of that stock within five years, and a forced, or compulsory retirement within ten years.

On January 8th, 1907, a resolution of the stockholders was passed approving the action of the board in not issuing 1,000 shares of preferred stock, as authorized by the resolution of February 3d, 1906, and approved an increase of the capital to [34] $500,000. No mention is made of any portion of this being preferred stock.

On November 15th, 1907, a resolution of the board of trustees authorizing the issue of $250,000 of preferred certificates of indebtedness was passed. These certificates were to bear interest at 7% per annum, payable semi-annually, to run for six years, expressly stipulating that the holders thereof should not be stockholders, but should be creditors. I might say in that connection that these certificates of indebtedness, so called, also provided that the

company should have the option of exchanging for these certificates of indebtedness preferred stock of the company, with like terms of payment, and like conditions.

On November 25th, 1907, a resolution of the stockholders was enacted to the same effect as the resolution of the board which I have just read, with the further provision that the company reserved the right in the certificates to issue in lieu thereof "preferred stock of said corporation of equal denominations and containing like terms and conditions of payment."

On January 25th, 1909, a resolution of the stockholders was passed increasing the capital to $1,000,000, of which 2,000 shares, or $200,000, were to be preferred. In that resolution the company reserves the right to redeem this preferred stock after five years and before ten years from the date thereof by paying the holders the principal and accrued interest, and a premium of five per cent; also reserves the right to retire the preferred stock after ten years by paying par value and accrued interest. It also provides that "said preferred stock shall be issued in such manner that the holder thereof shall not be entitled to vote the same, unless the company has been delinquent in the payment of interest thereon for a period of one year, and in such event such owner shall be entitled to participate in the conduct of the affairs of the company in the same manner as the owner of common stock therein."

[35]

The preferred stock issued follows the form of the resolution, except that there is nothing printed thereon in regard to the right to vote or participate in the affairs of the company.

Mr. FAVILLE.—Mr. Gilbert, did that provision contain a guaranty?

Mr. GILBERT.—Yes; the resolution referred to also provides for the payment of interest upon this stock at the rate of seven per cent per annum, payable annually. Is that what you refer to?

Mr. FAVILLE.—Yes; semi-annually.

Mr. GILBERT.—Semi-annually.

Now, your Honor, I think, has gathered from my statement that in the first place there were issued these preferred certificates of indebtedness, which was nothing more nor less than a borrowing scheme to the extent of $250,000.

Now, these preferred certificates of indebtedness were either paid for in cash, or were redeemed by issuing this preferred stock which is now made the basis of a claim by these creditors. Now, the preferred stock certificate upon which these claims are based reads as follows:

"No. 250. ——— Shares.

Incorporated Under the Laws of the State of Washington.

Preferred Certificate of Stock

of

Fidelity Lumber Co.

Capital Stock $1,000,000.

This certifies that ——— is the owner of ——— shares of the preferred stock of the Fidelity Lum-

ber Co., of the par value of one hundred dollars per share, transferable only on the books of the corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate of stock is entitled to **[36]** interest on the par value hereof at the rate of seven per cent per annum, payable semi-annually on the first days of July and January of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and said company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying the owner hereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

IN WITNESS WHEREOF, the said corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the corporation, at Spokane, Washington, this —— day of ————, A. D. 19——."

Now, a great many of these certificates of preferred stock, your Honor, at the time of issuance had riders attached to them, which, though they varied

somewhat in form and execution, are all practically in substance the same. For instance, I will read the one which was attached to certificate No. 3:

"For value received the Fidelity Lumber Co. hereby agrees with Francis G. Bishop, owner of preferred certificate of stock No. 3, for three shares of the preferred of the Fidelity Lumber Co., to redeem said stock at par, with accrued interest, at the end of five years from the date of said certificate, upon writen request of the holder or his assigns. Fidelity Lumber Co., by A. J. Wilson, Secretary. Dated at Spokane, Washington, April 30, 1909."

As I say, the form varies somewhat, but the effect is the same, that they will redeem the issued certificate at a certain **[37]** time.

I think that probably covers the facts, and the question arises whether in that situation the holder of one of these certificates of preferred stock can properly, under these circumstances, claim to be a creditor, or whether he is a stockholder.

Mr. HURN.—Mr. Gilbert, these certificates you spoke of as certificates of credit, there was $250,000 authorized, but how much was actually issued?

Mr. GILBERT.—686 shares. That amounts to $68,600.

As to the C. W. Carter note, amounting to $2,500 and interest, the only point that we cannot agree upon is the fact that this note represents in part not only cash loaned to the company, but interest on these preferred certificates. The note represents an actual cash loan of $2,500, but there had been interest paid by the company on these preferred

certificates, which, if unlawfully paid, would constitute a counterclaim to the note.

I presume that we may stipulate that my statement of facts may be accepted as the facts upon which the Court will base its findings.

Mr. FAVILLE.—Will you consent to two other propositions: That as to a large amount of this preferred stock interest was in fact paid at the rate specified in that certificate, and at the time fixed in the certificate, and without reference to the fact as to whether the company had earned the dividends out of which the same could be paid, and was in fact so paid; and also the further fact that of the issue of stock about $60,000 was in fact paid for in full by the company, with the interest on it?

Mr. GILBERT.—That is the fact, and we will concede it.

Mr. FAVILLE.—Now, with regard to the other matter, it may be stipulated that the Court shall find these matters in finding and decree that the statement made by Mr. Gilbert, supplemented by the statement I have just made, shall be the finding of the Court as to [38] the facts upon which his conclusion is predicated.

The COURT.—Very well.

Mr. FAVILLE.—And I think we can embody them in the decree, possibly, as a finding of fact.

There are some other claims, your Honor, that I am interested in for clients, of another character. Mr. Gilbert and I have agreed, and I think we might stipulate as to them.

Mr. GILBERT.—The S. G. Armstrong claim as

filed, the receiver recommends the allowance of that part of the claim based upon the $2,500 note. The rest of the claim includes a $156 note which was executed as a premium on an exchange of common for preferred stock that we have not allowed. There are eleven shares of preferred stock with these riders attached, guaranteeing redemption at a certain date, and twenty-six shares of preferred stock without riders. Both of those we have not allowed.

Mr. FAVILLE.—The others will be allowed.

Mr. GILBERT.—The others will be allowed.

Mr. FAVILLE.—Now, on that other proposition, as to the issuance of notes by the company as a premium on stock that you refer to, I suppose the Court shall make a finding on them, as you do not allow them.

Mr. GILBERT.—Yes.

Mr. FAVILLE.—Just state the fact, what it is, and that you do not allow it. There are a number of notes, so that your Honor by a general order can make such finding and classify them, so that we can classify those that fall within that class.

Mr. CAMPBELL.—Those notes that you say there is no objection to, were they given in payment of some of this preferred stock?

Mr. GILBERT.—No, absolute loans.

Mr. FAVILLE.—Absolute cash loans.

Mr. GILBERT—The facts in reference to those so called premium notes, and the S. G. Armstrong note in particular, as I understand [39] it, are simply these: A stockholder holding common stock ar-

ranged with the company to exchange it for preferred stock. In the exchange one stock had a greater book value on the books of the company than the other, and representing the difference in value the company executed a note to the holders with whom it made the exchange. Our position in regard to that is that a corporation in this state is not permitted to deal in its own stock in any way. We feel that the corporation has no right to pay a premium to one class of stockholders over the other, or deal in the stock in any way, and that is what the transaction amounted to.

Mr. FAVILLE.—This is the fact with regard to that whole classification of notes.

Now, on the Hakes' claim—

Mr. GILBERT.—As to the M. Hakes' claim, the receiver recommends an allowance as to the note of $1,700, which I find is a *bona fide* loan, and accrued interest on that note, both on the note itself, and accrued interest on a previous note, of which the present note was a renewal.

We do not recommend allowance of the note for $240 and interest, representing a six per cent premium on the exchange of stock. That comes within the same class just discussed.

The receiver does not recommend the allowance of the claim based upon forty shares of preferred stock, with no rider attached, nor upon the seventeen shares of preferred stock with the rider attached.

Mr. FAVILLE.—Yes; I take it that those will all

fall into their proper places in the final adjustment of the matter.

Mr. GILBERT.—On the claim of F. R. Cornish, the receiver recommends the allowance of a note for $1,000, dated April 23, 1914, and interest. Also a note for $1,000, dated December 28, 1913, with interest. The receiver does not recommend the allowance of the claim for $600, as represented by a note of November 18, 1911, given as a premium on **[40]** the exchange of stock; nor a note for $360 of the same date, given for a premium on an exchange of stock; nor a claim based upon 185 shares of preferred stock, 25 of which bear riders guaranteeing redemption at a certain date, and 160 of which contain no riders.

The claim of F. F. Faville, five shares of preferred stock with a rider, and 58 shares of preferred stock without a rider, we do not recommend allowance. Nor do we recommend the allowance of a note for $439.07, representing a premium on an exchange of stock.

The claim of Cora F. Faville, based on two shares of preferred stock with a rider, and eighteen shares of preferred stock without a rider, and a note for $108 given for premium on an exchange of stock, we do not recommend the allowance of.

Now, there is another class of claims, if your Honor pleases, that I would like to call the Court's attention to, and that is claims based on notes given in redemption of this preferred stock. Mr. Lund is here representing one of such claims, and I think

we might as well agree upon the facts, Mr. Lund, in that case. I may state them, may I not?

Mr. LUND.—I think so.

Mr. GILBERT.—I understand the claim of the Scandinavian-American Bank is based upon notes given by the Fidelity Lumber Company in redemption of certificates of stock theretofore held by the bank. The stock in question, I believe, contains the riders that we have discussed here.

Mr. LUND.—Yes.

Mr. GILBERT.—Now, as to that, it seems to me that if the Court should hold that this is stock, and not a money obligation, that under the laws of this state a corporation is expressly prohibited from reducing its capital stock in any but a specified manner, and it would be unlawful for this corporation to give a note in redemption of its stock, and if it did give such a note with that consideration involved the note would have to fall. In other words, that the [41] corporation would not be permitted to voluntarily either in cash or by money obligation attempt to retire any of its stock to the prejudice of any of the general creditors.

Mr. LUND.—I would like in addition, Mr. Gilbert, to state the origin of this stock. The facts are that the Fidelity Lumber Company agreed with C. E. Semple & Son to purchase certain timber claims which they owned, I think on the Pend d'Oreille River, for a certain fixed sum. They paid them part in cash, and gave them these certificates of stock, with the obligation of the company attached to redeem, and pay interest at a certain rate.

The obligations were eventually hypothecated with the Scandinavian-American Bank, which consequently became the owner. In the meantime the company paid the interest at the times stated regularly, without reference to the earnings of the company; and at a certain time, which we take it is immaterial, but at a time when the corporation was entirely solvent, they issued the note to the Scandinavian-American Bank for this amount of money in redemption of this stock.

Mr. GILBERT.—Mr. Lund, do I understand that it is your claim that the Fidelity Lumber Company's obligations to the Semples were put up at the bank, or just the stock?

Mr. LUND.—Simply the stock with the rider.

Mr. GILBERT.—Yes; that is correct.

Mr. LUND.—But originally it was given in payment of the purchase price of some timber claims, or partly.

Mr. GILBERT.—That is correct.

Mr. LUND.—The other portion having been paid in cash.

Mr. GILBERT.—Now, as to the Bruce-Edgerton Lumber Company claim, which is quite a large claim, the receiver is prepared to recommend the allowance of that claim, in full, with the following exceptions:

Included in the claim is an item of $6,000 and odd, which is designated as a bonus, or premium which is being charged up to [42] the Fidelity Lumber Company, said to represent a loss or sacrifice which the Bruce-Edgerton Lumber Company made in selling certain line lumber-yards in order to raise the

money to loan to the Fidelity Lumber Company. I think the facts which we will have no dispute about are as follows: That the Bruce-Edgerton Lumber Company from time to time had loaned large amounts of money to the Fidelity Lumber Company; that the Fidelity Lumber Company was in need of further funds, and the Bruce-Edgerton Lumber Company agreed to loan those funds; that in order to raise the funds for the purpose of loaning this money to the Fidelity Lumber Company the Bruce-Edgerton Lumber Company sold certain of its assets, to wit, lumber-yards; that besides charging ten per cent interest on the money loaned to the Fidelity Lumber Company there was charged up this so-called bonus, representing what they said they were obliged to sacrifice by making a quick sale of these line yards; that the Fidelity Lumber Company agreed to pay this bonus by appropriate action through its board of directors. We are resisting the allowance of that item, if your Honor pleases, because it seems to us that it would be allowing this debtor to pay an usurious rate of interest on the money loaned, and would, therefore, be unlawful, and the Court could not consider it. I do not particularly want to urge the objection, but I do not want to be put in the position of conceding an item of that kind.

Mr. FAVILLE.—Did your statement include the fact that it was agreed between the parties that the amount was a fair amount which was to be so paid?

Mr. GILBERT.—Yes, it was agreed between the Fidelity Lumber Company and the Bruce-Edgerton

Lumber Company that this item was a fair amount, and should be paid.

The COURT.—Don't you think it would violate the usury law of the state?

Mr. FAVILLE.—The only thing I can plead in behalf of these people [43] is that one of them lives in Minnesota, and may not be familiar with the laws of the State. The situation is exactly as Mr. Gilbert outlined it. The Bruce-Edgerton Company had a contract by which they were to be paid ten per cent interest, and in order to secure this money at a time when the money market was very stringent, being very largely interested in this company, they made sacrifices of their yards in Minnesota, and it was agreed between the companies afterwards that the six thousand dollars in fact represented such a loss, which they suffered, and the other company agreed that they would make them whole on that proposition. Those are the absolute facts. What the result is is a matter of law, I think.

Mr. ORR.—I am not quite clear on the status of this C. W. Carter claim. The only thing I know of the facts is what Mr. Carter has written me from Los Angeles. He states in his letter that this note of $2,500 was for money loaned, and unpaid interest on the original loan, and he also states in his objections which he filed here that he at one time did have six shares of this preferred stock; that the company redeemed that stock by giving him a note for the amount of it, with the accrued interest, amounting to something like $680, and that the note was paid

to him in full. I think that is Mr. Carter's understanding of it, and if that is correct there is no part of this preferred stock, or the interest that is due on it, in this $2,500 note. That is a separate transaction that was paid some time ago. The only question is whether they can recover that back from him.

As to Marium Carter, there is an item here as to which they claim he acted as her agent. They gave her a note at the same time that they gave him a note in redemption of this preferred stock, and that he collected that as her agent, and they are offsetting that as against this claim of his. It seems to me that whatever the ruling of the Court might be, that they could not counterclaim a distinct claim against some other individual simply because he acted as agent in the matter, and the question is whether [44] they have a right to recover those payments back or not.

The COURT.—Does that dispose of all the questions of fact?

Mr. GILBERT.—There are two or three other claims.

Mr. HURN.—If the Court pleases, there is a claim here of S. K. Long. As I understand the facts, Mr. Long has a promissory note for $175, which is a direct loan to the company made by him, and that he has never had any stock in the company, and never negotiated for any; never had any dealing with the company other than this loan of $175.

The COURT.—What is the objection to the claim, Mr. Gilbert?

Mr. GILBERT.—I am trying to find out.

Mr. HURN.—If there is anything about this I would like to introduce testimony now, so that it might be out of the way.

Mr. GILBERT.—The objection that we have in mind to that claim is this: The company redeemed certain preferred stock held by one J. C. Jacobson, and instead of issuing a note to Jacobson, through some arrangement between Jacobson and Long, a note was issued to A. K. Long, which would involve the question whether Long had any notice as to what this note was given for.

Mr. HURN.—Mr. Lee is here, and I will put him on the stand with reference to that claim.

The claim of H. S. Temple, I can testify to that myself.

The claim of A. G. Willis—

Mr. GILBERT.—I went over the Temple claim with Mr. Hurn, and I am satisfied that that should be allowed, under his statement as filed.

The COURT.—Very well.

Mr. HURN.—Now, the claim of A. G. Willis?

Mr. GILBERT.—As to the A. G. Willis claim, and the B. L. Willis claim, the only possible objection to those claims grows out of redemptions of this preferred stock. For instance, as to Mr. Willis' claim, he has a credit of something like $1,600 on the books of the company for salary during the last year before the receivership. Now, it is a mutual running account over a period of quite [45] a few years, and among other items in the account are several credits for the redemption of this preferred

stock. If the Court should hold that this redemption was invalid, then those credits should be stricken from the account, and that would probably leave Mr. Willis a small debtor to the company instead of a creditor.

As to the A. G. Willis account, Mrs. Willis, we claim that is based upon a note which was given and charged to Mr. B. L. Willis. So, that, if the redemption of the stock should taint the account at all it would involve these items. I don't say that it would; I don't know. It depends upon how far the Court goes in its holding.

Mr. HURN.—We can agree upon the facts as to B. L. Willis, can't we?

Mr. GILBERT.—I think we can.

Mr. HURN.—I will make a statement, then as I understand it: That about the 1st day of December, 1914, there was standing to the credit of B. L. Willis upon the books of the Fidelity Lumber Company for approximately $100; that at about that date the affairs of the Fidelity Lumber Company were placed in the hands of what was designated as a creditors' committee, who had complete and full management of all its affairs from that time on up to the time of the appointment of the receiver by the Court. That while the affairs of the company were in the hands of this creditors' committee B. L. Willis was employed by this committee to work for the committee in the mill of the company at Newport, Washington; that all of the account of $1,399.35 which he claims, except this $100 standing to his credit at the time of the appointment of the so-called creditors'

committee, was earned by him while acting for this creditors' committee, and allowed by him to stand to his credit on the books of the company; and that none of this sum, either the $100 or the balance of it, had any relation to any stock transaction with the company, but was solely his personal earnings during that time.

Mr. GILBERT.—I better put the agreement this way: We will agree that Mr. Willis would testify to that state of facts, and we will [46] offer no testimony to the contrary.

The COURT.—Very well.

Mr. HURN.—Now, as to the A. G. Willis claim: Mr. B. L. Willis will testify to the following state of facts, and it may be stipulated in that way:

That at about the date of this promissory note his wife, A. G. Willis, was the owner of 160 acres of timber land which she had acquired under the timber culture act, and that she sold this timber claim to the Fidelity Lumber Company, and that the note in question was given by the Fidelity Lumber Company to her in payment for this timber claim; that it was her own separate property, and that the note or any part of it did not grow out of any transaction in relation to stock, or any stock certificates, or in any other form than the purchase of the real estate by the company from her.

Mr. GILBERT.—May I inquire what you know about the charging of this particular note to Mr. Willis' account?

Mr. HURN.—I know nothing about it.

Mr. GILBERT.—I was wondering if we couldn't

reserve decision upon that, and we will investigate a little further.

The COURT.—Very well.

Mr. HURN.—The matter may stand this way: If we can agree upon it afterwards I presume the Court will not make any findings upon it.

The COURT.—Anything further?

Mr. CAMPBELL.—I have a petition I would like to read and file. Mr. Hurn has referred to a certain creditors' committee. It seems that about November 14th, 1914, the creditors got together and agreed upon an extension of time, and appointed a creditors' committee, consisting of Mr. Yeomans, of the Old National Bank, Mr. McClintock of the McClintock-Trunkey Company, and Mr. Thompson of the Holley-Mason Company, who should have charge of the business of the Fidelity Lumber Company, with an opportunity to try to work it out, or reorganize it, and that agreement provided that it [47] should not be binding unless it was signed by 95 per cent of the creditors; and that they should take hold of the business and conduct it, pay the running expenses, and have full charge of the business. They took possession of the business under this agreement, and proceeded to conduct the business. In the conduct of the business it was necessary for them to buy supplies and to employ men; and in buying those supplies and employing the men the committee told them that it was their understanding that those claims so contracted by them would be preferred claims.

I am asking to file a petition setting out a list of the claims which were incurred by this committee

during this time, and ask that they be allowed as preferred claims—not preferred as against any mortgage claims, but as against nonsecured creditors.

The COURT.—What do they amount to?

Mr. CAMPBELL.—They amount to $7,159.94.

The COURT.—Were they presented to the receiver?

Mr. CAMPBELL.—Yes; I think so. I will say that this committee at the time the receiver was appointed turned over something like $3,500 in cash, which if it had been used at the time probably would have been sufficient to pay the accounts which were then due. That these accounts that are asking to be allowed as prefered claims were current accounts necessary for the committee to incur to keep the business going, and this was simply the accumulation at the time of the appointment of the receiver. More than 95 per cent of the creditors.

The COURT.—Is that claim resisted by the receiver?

Mr. CAMPBELL.—I just handed him the petition this morning, and I don't really know.

Mr. GILBERT.—I might explain our position in reference to that. When notice was first published there were a number of creditors that called our attention to the claim for preferences on account of this committee agreement. I advised the receiver at that time [48] that I couldn't figure out why they were entitled to any preference on them, and so advised them. All the creditors then came in and filed regularly verified claims. After this notice for this particular hearing, however, the question

was again raised, and I said I did not feel as attorney for the receiver that I ought to interfere between two classes of creditors, so that we have never formally allowed or disallowed it. I think this is a matter, however, that ought to be brought up regularly in a way that all other creditors would have notice of this application. It includes about $7,000. If that was the arrangement, and any just ground can be found for preferring those claims the receiver has no objection.

Mr. CAMPBELL.—I would think those creditors who signed that agreement, constituting more than 95 per cent of them, should not object, and I don't believe that they would, and I don't think they ought to be allowed to, because they were parties to the agreement; and while the agreement does not specifically state that this indebtedness shall be treated as preferred, it was so understood, and it does provide that they shall proceed, and pay the running expenses. I would be very glad to have that brought up at any time. The reason it was not filed sooner is because I was out of the city and just returned a few days ago, and the matter was just brought to my attention Saturday. But, if they desire to have it set down for further hearing I would be glad to have it done.

Mr. LUND.—Have these claims been presented?

Mr. GILBERT.—They have been allowed as general claims.

Mr. LUND.—Not as preferred claims.

Mr. GILBERT.—No.

Mr. CAMPBELL.—I thought they had been taken

up with the committee, but the committee has not had the matter brought to their attention until recently. I think they expect the committee to see that they are paid. [49]

Mr. GILBERT.—If I may be permitted to suggest, if it would not unduly delay the hearing of that petition I think notice of this application ought to be given to the creditors. We have filed a report in which it is stated that these are filed as general claims.

The COURT.—The report should not be changed without giving notice to the creditors.

Mr. CAMPBELL.—Might I not file this petition, Your Honor, and have notice sent?

The COURT.—Yes; you may file the petition.

Mr. CAMPBELL.—I have handed the petition to Dr. Hare, and ask that it be filed.

The COURT.—Is there anything further?

Mr. GILBERT.—I would like to have the Court fix a time when each party in interest may file a brief, or statement of his position.

The COURT.—I would like to have a statement of facts agreed upon here, classifying the different claims, showing what head they come under.

Mr. GILBERT.—We will have these agreed statements written up by the stenographer and furnish them to the Court as a statement of facts.

Mr. FAVILLE.—With regard to that other matter I will state this further fact: That concerning $6,100 of the Bruce-Edgerton Lumber Company claim growing out of the sacrifice by reason of the sale of yards to raise this money, that being filed as a claim,

it is not their contention that the entire indebtedness is tainted with usury.

The COURT.—Oh, no; just the objection to that one part of it.

Mr. FAVILLE.—That one claim is the illegal claim; it limits it to that.

The COURT.—Yes. It would, in my opinion, afford a very easy way to override the usury law of the state if a claim of that kind should be allowed.

The foregoing constitutes all the proceedings had at said [50] hearing.

[Endorsements]: Statement of Facts. Filed June 13, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [51]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

2208.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,

Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,

Defendant.

Opinion.

HAMBLEN & GILBERT, for Receiver.

FAVILLE & WHITNEY, F. B. DODDS, J. B. CAMPBELL, HURN & HURN, CHARLES P. LUND and JOHN E. ORR, for Creditors.

RUDKIN, District Judge.

In view of the agreed statement of facts in this case I will not go into details, but will content myself with a brief statement of my conclusions and the reasons therefor.

The principal and most difficult question in the case relates to the status of the holders of so-called preferred stock certificates, some of which have riders or agreements on the part of the corporation thereto attached. These certificates and riders are substantially in the following form:

"This certifies that ———— is the owner of —— shares of the preferred stock of the Fidelity Lumber Company, of the par value of one hundred dollars per share, transferable only on the books of the corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

"The owner of this certificate of stock is entitled to interest on the par value hereof at the rate of seven per cent per annum, payable semi-annually on the first days of July and January of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying

the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and said company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying the owner thereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stock-holders' [52] meeting held January 5th, 1909.

"For value received the Fidelity Lumber Co. hereby agrees with ————————, owner of prefererd certificate of stock No. —— for —— shares of the preferred of the Fidelity Lumber Co., to redeem said stock at par, with accrued interest, at the end of five years, from the date of said certificate, upon written request of the holder or his assigns.

"FIDELITY LUMBER CO.

"By A. J. WILSON, Secretary."

The resolution referred to in the foregoing certificate provided for an increase in the capital stock of the corporation from $500,000 to $1,000,000, of which $200,000 should be preferred. The stock as issued conforms to the resolution aside from the fact that the resolution contained a provision that if the corporation defaulted in the payment of interest for a period of one year, the holder of the certificate should be entitled to vote and participate in the conduct of the affairs of the company in the same manner as the owner of common stock.

The statutes of the State of Washington provide

that no corporation shall commence business, or institute proceedings to condemn land for corporate purposes until the whole amount of the capital stock has been subscribed; and that it shall be unlawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, or divide, withdraw, or in any way pay to stockholders any part of the capital stock of the company, or reduce the capital stock of the company except in the mode prescribed by law.

Rem. & Bal. Codes and Statutes of Washington, Sections 3677 and 3697.

"Strictly the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise."

10 Cyc. 264.

In view of these statutory provisions in my opinion the certificates here in question represent a part of the authorized capital of the corporation, and the agreement on the part of the [53] corporation to retire or redeem them is null and void.

Tait v. Pigott, 32 Wash. 344 and 38 Wash. 59.

Tacoma Ledger Co. v. Western Home etc. Asso., 37 Wash. 467.

Spencer v. Smith, 201 Fed. 647.

The differences between these certificates and riders and the certificates in Spencer v. Smith, *supra,* are slight and unimportant, and the conclusion of the Court in that state is in harmony with our statutes in accordance with sound public policy.

Substantially all the authorities bearing upon the question are reviewed in that case and no useful purpose will be subserved by a further citation or review of them at this time.

While, therefore, the contracts embodied in the certificates and riders are valid as between stockholders and as against the corporation, they are void as to creditors, and all obligations of every kind and character arising out of them must be postponed until the claims of general creditors have been satisfied in full.

The claim of the Bruce-Edgerton Lumber Company in the sum of $6,187.50, representing a bonus or premium on a loan from that company to the Fidelity Lumber Company is plainly violative of the usury law of the state and must be disallowed.

These general observations will perhaps be sufficient to enable counsel to classify and liquidate the different claims presented to the receiver. Let an order be submitted in accordance herewith.

[Endorsements]: Opinion. Filed in the U. S. District Court, Eastern District of Washington. June 29, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [54]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Order Allowing and Rejecting Claims.

This matter coming regularly on for hearing on the 8th day of May, 1916, upon the report of the receiver herein of claims filed, and upon the show cause order of this Court requiring creditors to appear and file any objection they might have to the report of said receiver, and upon the various objections filed by certain creditors herein; W. S. Gilbert, of Hamblen & Gilbert, appearing for the receiver, and Messrs. John E. Orr, J. B. Campbell, F. F. Faville, C. P. Lund and D. W. Hurn appearing on behalf of various creditors and the parties appearing at said hearing having stipulated as to the allowance of certain claims, and having stipulated in open court as to the facts in connection with other claims which the receiver had disallowed, and the Court having heard the argument of counsel and having considered the written briefs filed herein, and hav-

ing heretofore filed herein its written opinion and decision:

It is ORDERED, ADJUDGED and DECREED, as follows:

1. That the payment by the receiver of all lienable claims set out in Schedule "A," attached to its report, be and the same is hereby approved.

2. That of the claims of all creditors heretofore filed with the receiver other than those already allowed and ordered paid as preferred claims, the following are hereby allowed and approved in the amounts set opposite their respective names: [55]

Anderson, Gust	Newport, Wash.	$ 83.65
Armstrong, S. G.	Cedar Rapids, Ia.	2611.67
Ballard, J. O.	Malone, N. Y.	1182.70
Bank of Colville	Colville, Wash.	5358.88
Bell & Turnbull	Newport, Wash.	71.10
Bowman Lumber Co., S. H.	Minneapolis, Minn.	5255.55
Boyer, J. F.	Los Angeles, Calif.	2172.89
Bruce, W. J.	Minneapolis, Minn.	815.03
F. A. Chamberlain, Trustee for creditors of Bruce-Edgerton Lumber Co.	Minneapolis, Minn.	79483.77
Carter, C. W.	Pasadena, Calif.	2028.19
Carter, Miss Luvicy E.	Santa Ana, Calif.	3237.40
Carter, Mrs. Marium	Santa Ana, Calif.	9401.90
Centennial Mill Co.	Spokane, Wash.	2423.92
Central Warehouse Lmbr. Co.	Minn. Trans., Minn.	23.12
Cerro Gordo State Bank	Clear Lake, Ia.	1075.77
Chicago & Northwestern Ry. Co.	Chicago, Ill.	40.69
Cornish, F. R.	Cedar Rapids, Ia.	2088.48
Dalkena Lumber Co.	Dalkena, Wash.	1536.21
DeVeuve Co., The James H.	Seattle, Wash.	2506.49
Empire Packing Co.	Spokane, Wash.	694.05
Erwin, F. I.	Mackay, Idaho	265.90
Fox, Mike	Newport, Wash.	138.24
Fidelity National Bank	Spokane, Wash.	5171.11
First National Bank	Primghar, Iowa	2790.58
Gordon & Co., B. L.	Spokane, Wash.	1027.69

Great Northern Railway Co.	Spokane, Wash.	8.00
Hakes, M.	Laurens, Iowa	1846.20
Hamblen & Gilbert	Spokane, Wash.	337.87
Holley-Mason Hdwe. Co.	Spokane, Wash.	8425.00
Hurn & Hurn	Spokane, Wash.	21.50
Imperial Coffee & Tea Co.	Spokane, Wash.	49.37
Jones & Dillingham	Spokane, Wash.	33.06
Kaniksu Boom & Nav. Co.	Priest River, Idaho	985.91
Lindsley Brothers Co.	Spokane, Wash.	2000.00
Long, Samuel K.	Newport, Wash.	199.85
McClintock Trunkey Co.	Spokane, Wash.	4310.50
McDonald & Son, W. W.	Medford, Oregon	5455.55
Montzheimer, A.	Joliet, Ill.	1395.29
Montzheimer, O. H.	Primghar, Ia.	95.80
Neumeyer & Diamond	New York, N. Y.	57.38
Norrish, R. S.	Morrison, Ill.	5522.92
Northern Handle Co.	Bowling Green, Mo.	238.87
Nott-Atwater Co.	Spokane, Wash.	1211.45
Old National Bank	Spokane, Wash.	80108.57
Panhandle Lumber Co.	Spirit Lake, Idaho	875.17
Priest River Hdwe. Co.	Priest River, Idaho	105.07
Rice, D. E.	Spokane, Wash.	15.99
Royal Indemnity Co.	Spokane, Wash.	2137.96
Ryan & Newton Co.	Spokane, Wash.	318.01
Security State Bank	Newport, Wash.	2578.33
Spielberg Co., The E. O.	Winslow, Neb.	3.50
Spokane Drygoods Co.	Spokane, Wash.	465.69
Spokane & Eastern Trust Co.	Spokane, Wash.	1013.22
Stahly, Ulysses	Colville, Wash.	534.11
Willis, A. G.	Spokane, Wash.	714.67
Standard Oil Co.	Spokane, Wash.	185.27
Stone, C. H.	Clayton, Ga.	2300.70
Temple, Anna S. (D. W. Hurn, Agt.)	Spokane, Wash.	1088.88
Union Securities Co.	Spokane, Wash.	3288.90
Valvoline Oil Co.	Portland, Oregon	49.12
Washington Machinery & Supply Co.	Spokane, Wash.	32.40
Young, George	Priest River, Idaho	24.96
Zwech, A. T.	Newport, Wash.	839.46
		$262,471.47

[56]

3. That all other claims filed with the receiver, except as allowed either in whole or in part in the foregoing paragraph, be and the same are hereby rejected and disallowed.

4. It appearing to the Court that the Old National Bank and F. A. Chamberlain, as trustee, have agreed upon the distribution of any dividends upon the claim of the Bruce-Edgerton Lumber Company which has been assigned to and is held by the said F. A. Chamberlain, as trustee, and is allowed in this order, and have filed herein a stipulation covering such agreement;

It is further ORDERED that 75% of all dividends which may be paid by the receiver on the claim of the said F. A. Chamberlain, as trustee, as allowed in this order, shall be paid to the Old National Bank of Spokane, Washington, and the balance thereof, to wit: 25% of such dividends, shall be paid to the said F. A. Chamberlain, trustee.

5. It further appearing to the Court from the report of the receiver on file herein that A. Montzheimer, O. H. Montzheimer, and C. H. Stone, three of the creditors above named have heretofore entered into a written agreement with the Old National Bank to the effect that the claim of the Old National Bank should be paid in full before anything should be paid upon the claims of said creditors;

It is further ORDERED that in the event the dividends paid on the claim of the Old National Bank herein shall be insufficient to pay said claim in full, then the dividends upon the claims of the said A. Montzheimer, O. H. Montzheimer and C. H.

Stone, or so much thereof as may be necessary to pay the claim of the Old National Bank in full, shall be paid to the Old National Bank, to all of which the objecting creditors whose claims are rejected, except, and their exception is allowed.

(Signed) FRANK H. RUDKIN, Judge.

[Endorsements]: Order Allowing and Rejecting Claims. Filed November 14, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [57]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Come now S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville, and Scandinavian-American Bank of Spokane, a corporation, and file the following assignment of errors upon which they will rely in the prosecution of their appeal in the above-entitled cause from the order and decree made by this Honorable

Court on the 14th day of November, A. D. 1916, in the above-entitled cause.

I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in rejecting the claims of S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville, and Scandinavian-American Bank of Spokane, a corporation, and each of them, duly presented to and filed with the Union Trust & Savings Bank, a corporation, as receiver for the Fidelity Lumber Company, a corporation, and in entering its order and decree rejecting and disallowing the claims of said parties, and each of them.

WHEREFORE, said S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville, and Scandinavian-American Bank of [58] Spokane, a corporation, appellants, and each of them, pray that said order and decree be reversed, and that said District Court be directed to allow said claims, and each of them.

(Signed) FAVILLE & WHITNEY,
CHARLES P. LUND,
Solicitors for Appellants.

Due service of the within assignment of errors by a true copy thereof is hereby admitted at Spokane, Washington, this 14th day of May, 1917.

(Signed) HAMBLEN & GILBERT,
Solicitors for Union Trust & Savings Bank, as Receiver for the Fidelity Lumber Company, a Corporation.

[Endorsements]: Assignment of Errors. Filed in the U. S. District Court for the Eastern District of Washington, May 14, 1917. W. H. Hare, Clerk. By S. M. Russell, Deputy. [59]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and Order Allowing Same.

To the Honorable District Court of the United States for the Eastern District of Washington, Northern Division.

Now come S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville, and Scandinavian-American Bank of Spokane, a corporation, and feeling themselves aggrieved by the order and decree made and entered by said Court on the 14th day of November, 1916, in the above-entitled cause, by Faville & Whitney and

Charles P. Lund, and do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herein, and pray that this appeal may be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers on which said order and decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that the proper order touching the security to be required of them to perfect that appeal, be made, fixing the amount of security which appellants shall give and furnish upon said appeal, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said appeal by the United States Circuit Court [60] of Appeals for the Ninth Circuit.

Dated this 14th day of May, 1917.

(Signed) FAVILLE & WHITNEY,
CHARLES P. LUND,
Solicitors for Appellants.

The foregoing petition granted and said appeal is allowed upon said parties appellant giving a bond, conditioned as required by law, in the sum of five hundred ($500) dollars.

Dated this 14th day of May, 1917.

(Signed) FRANK H. RUDKIN,
United States District Judge.

Copy of within petition for appeal and order al-

lowing same and fixing bond acknowledged this 14th day of May, 1917.

(Signed) HAMBLEN & GILBERT,
Solicitors for Union Trust & Savings Bank, a Corporation, Receiver for the Fidelity Lumber Company, a Corporation.

[Endorsements]: Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and Order Allowing Same. Filed in the U. S. District Court for the Eastern District of Washington. May 14, 1917. W. H. Hare, Clerk. By S. M. Russell, Deputy. [61]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville, and Scandinavian-American Bank of Spokane, a cor-

poration, as principals, and O. A. Johnson and Clyde Johnson, as surety, are held and firmly bound unto Union Trust & Savings Bank, as receiver for the Fidelity Lumber Company, a corporation, in the penal sum of five hundred dollars ($500), for which payment well and truly to be made we bind ourselves, our heirs, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of May, 1917.

WHEREAS, lately at the September term, A. D. 1916, of the District Court of the United States, for the Eastern District of Washington, Northern Division, in an action pending in said court between Continental & Commercial Trust & Savings Bank, a Corporation, and Ralph Van Vechten, Trustees, Plaintiffs, vs. Fidelity Lumber Company, a Corporation, Defendant, a final order and decree was entered against said parties, and said parties having obtained from said Court an order allowing the appeal to reverse said order and decree in the aforesaid suit, and a citation directed to the said Union Trust & Savings Bank, a corporation, as receiver for the Fidelity Lumber Company, a corporation, is about to be issued citing and admonishing it to be and appear at the United States Circuit [62] Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco thirty days from and after the filing of said citation;

NOW, THE CONDITION of the above obligation is such that if the said S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble,

Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville, and Scandinavian-American Bank of Spokane, a corporation, shall prosecute their appeal to effect, and shall answer all damages and costs that may be awarded against them, or either of them, if they, or either of them, fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and effect.

(Signed) S. G. ARMSTRONG,
F. R. CORNISH,
M. HAKES,
T. A. TRIMBLE,
MARY E. TRIMBLE,
HOMER TRIMBLE,
HARRY TRIMBLE,
CORA T. FAVILLE,
F. F. FAVILLE and
SCANDINAVIAN-AMERICAN BANK OF SPOKANE, a Corporation.
By FAVILLE & WHITNEY,
CHARLES P. LUND,
Their Attorneys.
O. A. JOHNSON,
CLYDE JOHNSON.

The Union Trust & Savings Bank, a corporation, as receiver for the Fidelity Lumber Company, a corporation, is satisfied with the within bond and the sureties thereon.

(Signed) HAMBLEN & GILBERT,
Attorneys for Receiver.

The foregoing bond is approved as to form, amount and sufficiency of surety this 14th day of May, 1917.

(Signed) FRANK H. RUDKIN,
Judge of the United States District Court, for the Eastern District of Washington.

[Endorsements]: Bond on Appeal. Filed in the U. S. District Court for the Eastern District of Washington. May 14, 1917. W. H. Hare, Clerk. By S. M. Russell, Deputy. [63]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Citation on Appeal.

The President of the United States to Union Trust & Savings Bank, a Corporation, as Receiver for Fidelity Lumber Company, a Corporation, and to Hamblen & Gilbert, Its Attorneys, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within

thirty days from the date hereof, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein Continental & Commercial Trust & Savings Bank, a corporation, and Ralph Van Vechten, trustees, are plaintiffs, and you are appellee, and Fidelity Lumber Company, a corporation, is defendant, and S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville and Scandinavian-American Bank of Spokane, a corporation, are appellants, and show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 14th day of May, 1917, in the year of Independence of the United States the [64] one hundred and forty-first.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

[Seal] Attest: (Signed) W. H. HARE,
Clerk.

Due service of the within citation by a true copy thereof is hereby admitted at Spokane, Washington,

this 14th day of May, A. D. 1917.

(Signed) HAMBLEN & GILBERT,
Solicitors for Union Trust & Savings Bank, a Corporation, as Receiver for Fidelity Lumber Company, a Corporation.

[Endorsements]: Citation. Filed in the U. S. District Court for the Eastern District of Washington. May 14, 1917. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[65]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Stipulation for Transcript of Record on Appeal.

It is hereby stipulated between appellants, by their solicitors, and the Union Trust & Savings Bank, a corporation, as receiver for the Fidelity Lumber Company, a corporation, by its solicitors, that the transcript of the record on appeal in the above-entitled cause shall be made up of the following papers:

Order appointing Union Trust & Savings Bank, a corporation, receiver for Fidelity Lumber Company, a corporation; and qualification.

Original claims of S. G. Armstrong, F. R. Cornish, M. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville, and Scandinavian-American Bank of Spokane, a corporation; presented to and filed with said receiver.

Petition of Union Trust & Savings Bank as receiver for the adjudication of claims (except Schedules "A" and "B").

Objections of appellants to Report of Receiver.

Agreed statement of facts of counsel for said appellants and receiver.

Opinion of the Court.

Order and decree thereon.

Petition for appeal and order allowing the same.

Assignment of Errors.

Bond on Appeal.

Order allowing bond.

Original citation, with acceptance of service. [66]

Stipulation as to making up of record;

—which comprise all of the papers, records and other proceedings which are necessary to the hearing of the appeal of said action in the United States Circuit Court of Appeals, and that no other papers, records or proceedings than those above mentioned need be included by the Clerk of said Court in making up his

return to said citation as a part of such record.

(Signed) FAVILLE & WHITNEY,
CHARLES P. LUND,
Solicitors for Appellants.
HAMBLEN & GILBERT,
Solicitors for the Union Trust & Savings Bank, as Receiver for Fidelity Lumber Company.

[Endorsements]: Stipulation for Transcript of Record on Appeal. Filed in the U. S. District Court for the Eastern District of Washington. May 14, 1917. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[67]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2208—Consolidated With No. 2218.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and RALPH VAN VECHTEN, Trustees,
Plaintiffs,

vs.

FIDELITY LUMBER COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, clerk of the District Court of the United States in and for the Eastern District of

Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said action, as the same remain of record and on file in the office of the clerk of said District Court, as called for in the stipulation between appellants, by their solicitors, and the Union Trust & Savings Bank, a corporation, as receiver for the Fidelity Lumber Company, a corporation, by its solicitors; and that the same constitute my return to the order of appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, lodged and filed in my office on the 14th day of May, 1917.

I further certify that I hereto attach and herewith transmit the original Citation issued in said cause.

I further certify that I hereto attach and herewith transmit the original claims of S. G. Armstrong, F. R. Cornish, M. Hakes, Cora T. Faville, F. F. Faville, and Scandinavian-American [68] bank of Spokane, a corporation, presented to and filed with said receiver.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amount to the sum of twenty-eight dollars and ten cents ($28.10), and that the same has been paid in full by Charles P. Lund, one of the attorneys for the appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

at Spokane, in said district, this 29th day of May, 1917.

[Seal] W. H. HARE,
Clerk. [69]

[Endorsed]: No. 3009. United States Circuit Court of Appeals for the Ninth Circuit. S. G. Armstrong, F. R. Cornish, H. Hakes, T. A. Trimble, Mary E. Trimble, Homer Trimble, Harry Trimble, Cora T. Faville, F. F. Faville and Scandinavian-American Bank of Spokane, a Corporation, Appellants, v. Union Trust & Savings Bank, a Corporation, as Receiver for Fidelity Lumber Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed June 9, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Exhibit—Proof of Claim of F. R. Cornish.

[Endorsed]: No. 3009. U. S. Circuit Court of Appeals for the Ninth Circuit. Exhibit—Proof of Claim of F. R. Cornish. Filed June 9, 1917. F. D. Monckton, Clerk.

PROOF OF CLAIM.

(Attach Itemized Statement.)

FIDELITY LUMBER COMPANY, DR.

Newport, Washington.

To F. R. Cornish,

705 First Avenue, Cedar Rapids, Iowa

For four notes (as per attached itemized statement)..... ....$3,316.82

Total amount,$3,316.82

State of Iowa,

County of Linn,—ss.

F. R. Cornish, being first duly sworn, on oath deposes and says:

That the foregoing account is a true and correct statement of the account due and owing from the Fidelity Lumber Company to the said F. R. Cornish, and that there are no offsets or counterclaims of any kind, character or description that have not been credited or offset against said account.

Dated at Cedar Rapids, Iowa, this 6th day of July, 1915.

F. R. CORNISH.

Subscribed and sworn to before me this 6th day of July, A. D. 1915.

[Seal] EMMA G. SUFFICOOL,

Notary Public in and for State of Iowa, Linn County, Residing at Cedar Rapids, Iowa.

Proof Claim for $2088.48 Allowed.

C. Ck. 10/21/16.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

PROOF OF CLAIM.

Supplemental to claim filed July 6th, 1915.

(Attach Itemized Statement.)

FIDELITY LUMBER COMPANY, DR.

Newport, Washington.

To F. R. Cornish,

705 First Avenue, Cedar Rapids, Iowa.

One Hundred Eighty-five (Copies of stock certificates herewith attached)

For shares, Preferred Stock.....$18,500.00

Interest (7%) from Jan. 1, 1912, to July 1, 1915, (3 yrs. 6 mos.)..... 4,532.50

Total amount, $23,032.50

State of Iowa,

County of Linn,—ss.

F. R. Cornish, being first duly sworn, on oath deposes and says:

That the foregoing account is a true and correct statement of the account due and owing from the Fidelity Lumber Company to the said F. R. Cornish and that there are no offsets or counterclaims of any kind, character or description that have not been

credited or offset against said account.

Dated at Cedar Rapids, Iowa, this 18th day of Aug., 1915.

F. R. CORNISH.

Subscribed and sworn to before me this 18th day of August, A. D. 1915.

[Seal] EMMA G. SUFFICOOL,
Notary Public in and for State of Iowa, Linn County, Residing at Cedar Rapids, Iowa.

(COPY)

$1000.00

Newport, Washington, Apr. 23rd, 1914.

Six months after date for value received, we promise to pay to the order of F. R. Cornish at his office in Cedar Rapids, Iowa, One Thousand and no/100 Dollars with interest, at the rate of —— per cent per annum payable annually from maturity until paid, with reasonable attorney fees and statutory costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS,
President.

No. 1347. Due Oct. 23, 1914.

[Endorsed]: B. L. Willis.

COPY.

$1000.00

Newport, Washington, Dec. 28, 1913.

Six months after date for value received, we promise to pay to the order of F. R. Cornish at his office in Cedar Rapids, Iowa, One Thousand and no/100 Dollars with interest, at the rate of —— per cent per

annum payable annually from maturity until paid, with reasonable attorney fees and statutory costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS,
President.

No. 1293. Due June 28, 1914.

[Endorsed]: B. L. Willis.

(COPY)

$600.00

Newport, Washington, Nov. 18th, 1911.

August 1st after date for value received, we promise to pay to the order of F. R. Cornish, Spokane, Wash., Six Hundred and no/100 Dollars with interest, at the rate of 6 per cent per annum payable—— annually from Aug. 1st, 1911, until paid, with reasonable attorney fees and statutory costs if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS,
President.

No. 810. Due Aug. 1st, 1912.

$360.00 (COPY)

Newport, Washington, Nov. 18, 1911.

August 1st after date for value received, we promise to pay to the order of Susan C. Cornish at Spokane, Wash., Three Hundred Sixty and no/100 Dollars with interest at the rate of 6 per cent per annum payable —— annually from Aug. 1st, 1911, until paid, with reasonable attorney fees and statutory

costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS,
President.

No. 811. Due Aug. 1st, 1912.

[Endorsed]: Pay to F. R. Cornish.

SUSAN C. CORNISH.

Exhibit—Proof of Claim of Cora T. Faville.

[Endorsed]: No. 3009. U. S. Circuit Court of Appeals for the Ninth Circuit. Exhibit—Proof of Claim of Cora T. Faville. Filed June 9, 1917. F. D. Monckton, Clerk.

PROOF OF CLAIM.

(Attach Itemized Statement.)

Fidelity Lumber Co., Dr.,
Newport, Washington.

To CORA T. FAVILLE, Storm Lake, Iowa,

For principal on 18 shares Preferred Stock in Fidelity Lumber Co., Certificate		
#1.	#163, copy Exhibit "A" hereto attached	$1800.00
Interest on same as per terms of Certificate January 1, 1912 to July 1, 1915.....		441.00
Interest on unpaid interest at 6% to July 1, 1915.....		39.69
Principal on 2 shares Preferred Stock in Fidelity Lumber Co., Certificate		
#2.	#55, amount due under special contract of July 1, 1909, on which no payment has been made; amount due December 1, 1913	227.95

Interest at 6% from December 1, 1913, to July 1, 1915..... 21.66

Copy of said Certificate attached marked Exhibit "B."

Copy of said Contract attached marked Exhibit "C."

Copy of letter demanding performance of contract marked Exhibit "D" attached.

Note of Fidelity Lumber Co. dated November 18, 1911, due August 1, 1911. Interest 6% payable annually from
#3. August 1, 1911. Copy of note attached hereto marked Exhibit "C." August due August 1, 1915.....136.16

Total amount, $2666.46

State of Iowa,
Buena Vista County,—ss.

Cora T. Faville, being first duly sworn, on oath deposes and says: That the foregoing account is a true and correct statement of the account due and owing from the Fidelity Lumber Company to the said Cora T. Faville, and that there are no offsets or counter claims of any kind, character or description that have not been credited or offset against said account.

Dated at Storm Lake, Iowa, this 9th day of July, 1915.

CORA T. FAVILLE.

Subscribed and sworn to before me this 9th day of July, 1915.

[Seal] HARRY J. CROUSE,
Notary Public in and for State of Iowa, Residing at Storm Lake, Iowa.

Not allowed.

C. Ck. 10/15/16.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

EXHIBIT "A."

Incorporated Under the Laws of the State of Washington.

No. 163 18 shares.

PREFERRED CERTIFICATE OF STOCK.

of

FIDELITY LUMBER COMPANY.

Capital Stock, $1,000,000.00.

THIS CERTIFIES that CORA T. FAVILLE is the owner of 18 shares of the Preferred Stock of the FIDELITY LUMBER CO., of the par value of One Hundred Dollars per share, transferable only on the books of the Corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate is entitled to interest on the par value thereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date

of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent therof, and said Company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying to the owner hereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

IN WITNESS WHEREOF, the said Corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation at Spokane, Washington, this 18th day of November, A. D. 1911.

B. L. WILLIS, Pres.

(Seal) A. J. WILSON, Secy.

Shares $100 each.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

EXHIBIT "B."

Incorporated Under the Laws of the State of Washintgon.

No. 55. 2 Shares

PREFERRED CERTIFICATE OF STOCK
of
FIDELITY LUMBER COMPANY.
Capital Stock, $1,000,000.00.

THIS CERTIFIES that CORA T. FAVILLE is the owner of two shares of the Preferred Stock of the

FIDELITY LUMBER CO., of the par value of One Hundred Dollars per share, transferable only on the books of the Corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate of stock is entitled to interest on the par value thereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and the said Company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying to the owner hereof of the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

IN WITNESS WHEREOF, the said Corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation at Spokane, Washington, this 1st day of July, A. D. 1909.

B. L. WILLIS, Pres.

(Seal) A. J. WILSON, Secy.

Shares $100 each.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

EXHIBIT "D."

Spokane, Washington.

By this SPECIAL AGREEMENT, made this first day of July, 1909, The Fidelity Lumber Company of Spokane, Washington, does hereby agree to redeem on the first day of December, 1913, Preferred Certificate of Stock dated July 1st, 1909, being Certificate No. 55 for 2 shares, by paying the Par Value of same to the holder together with all unpaid accrued interest; the surrender of said certificate with this special contract to be made to the Company at the time payment is received. But the holder of said Certificate may at her option retain the same and receive all benefits, until maturity, by surrendering this special contract to the Company for cancellation.

FIDELITY LUMBER COMPANY.
By B. L. WILLIS, Pres.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

EXHIBIT "D."

December 6, 1913.

Mr. B. L. WILLIS,
c/o Fidelity Lumber Co.,
Newport, Wash.

Dear Sir:

I find that I have two certificates of stock cover-

ing seven shares of the preferred stock of the Fidelity Lumber Company, that was redeemable under a special contract on the 1st day of December, 1913. Two of these shares, in certificate #55 belong to Mrs. Faville, and five shares in certificate #54 belong to me.

I enclose herewith a copy of the special agreement made in regard to these shares, providing for their redemption at par value, together with all unpaid accrued interest. I do not find that any interest has been paid on these shares since July 1, 1911.

We desire to have the special agreement carried out and the shares redeemed, and the accrued interest paid, and do not wish to avail ourselves of the option to retain the same until maturity.

If you will send the amount of the principal and accrued interest to me I will forward the certificates for cancellation, or if you prefer you may remit to the Commercial National Bank of this city and I will turn the certificates over to them, or will forward them to your bank for collection, just as you prefer. We are, however, depending on the redemption of these certificates according to this contract.

Yours very truly,

F. F. FAVILLE.

H.

P. S.—These two certificates are the original certificates of preferred stock issued to us July 1, 1909.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,

Receiver Fidelity Lumber Co.

EXHIBIT "E."

$108.00.

Newport, Washington, Nov. 18, 1911.

August 1st, after date for value received, we promise to pay to the order of CORA T. FAVILLE at Spokane, Wash., One Hundred Eight and no/100 Dollars, with interest at the rate of 6 per cent per annum payable annually from August 1, 1911, until paid with reasonable attorney fees and statutory costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

No. 813.
Due Aug. 1, 1912.

Exhibit—Proof of Claim of F. F. Faville.

[Endorsed]: No. 3009. U. S. Circuit Court of Appeals for the Ninth Circuit. Exhibit—Proof of Claim of F. F. Faville. Filed June 9, 1917. F. D. Monckton, Clerk.

PROOF OF CLAIM.

(Attach Itemized Statement.)

Fidelity Lumber Company, Dr.,
Newport, Washington.

To F. F. FAVILLE, Storm Lake, Iowa,

For principal on 58 shares Preferred Stock in Fidelity Lumber Co., Certificate #1. #162, copy Exhibit "A" hereto attached $5800.00

Interest on same as per terms of Certificate January 1, 1912, to July 1, 1915..... 1421.00

	Interest on unpaid interest at 6% to July 1, 1915	127.89
#2.	Principal on 5 shares Preferred Stock in Fidelity Lumber Co, Certificate #54, amount due under special contract of July 1, 1909, on which no payment has been made; amount due December 1, 1913.....	570.42
	Interest at 6% from December 1, 1913, to July 1, 1915.....	54.17
	Copy of said Certificate attached marked Exhibit "B".....	
	Copy of said Contract attached marked Exhibit "C".....	
	Copy of letter demanding performance of contract marked Exhibit "D" attached.	
#3.	Note of Fidelity Lumber Co. dated November 18, 1911, due August 1, 1911. Interest 6% payable annually from August 1, 1911. Copy of note attached hereto marked Exhibit "E." Amount due August 1, 1915.....	439.02
	Total amount,	$7912.50

State of Iowa,
Buena Vista County,—ss.

F. F. Faville, being first duly sworn, on oath deposes and says: That the foregoing account is a true and correct statement of the account due and owing from the Fidelity Lumber Company to the said F. F. Faville, and that there are no offsets or counter-

claims of any kind, character or description that have not been credited or offset against said account.

Dated at Storm Lake, Iowa, this 9th day of July, 1915.

F. F. FAVILLE.

Subscribed and sworn to before me this 9th day of July, 1915.

[Seal] HARRY J. CROUSE,
Notary Public in and for State of Iowa, Residing at Storm Lake, Iowa.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

Not allowed.

C. Ck. 10/25/16

EXHIBIT "A."

Incorporated Under the Laws of the State of Washington.

No. 162. 58 shares.

PREFERRED CERTIFICATE OF STOCK.

of

FIDELITY LUMBER COMPANY.

Capital Stock, $1,000,000.00.

THIS CERTIFIES that F. F. FAVILLE is the owner of 58 shares of the Preferred Stock of the FIDELITY LUMBER CO., of the par value of One Hundred Dollars per share, transferable only on the books of the Corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate is entitled to interest on the par value thereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and said Company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying to the owner hereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

IN WITNESS WHEREOF, the said Corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation at spokane, Washington, this 18th day of November, A. D. 1911.

B. L. WILLIS, Pres.

[Seal] A. J. WILSON, Secy.

Shares $100 each.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

EXHIBIT "B."

Incorporated Under the Laws of the State of Washington.

No. 54. 5 Shares

PREFERRED CERTIFICATE OF STOCK

of

FIDELITY LUMBER COMPANY.

Capital Stock $1,000,000.00.

THIS CERTIFIES that F. F. FAVILLE is the owner of five shares of the Preferred Stock of the FIDELITY LUMBER COMPANY, of the par value of One Hundred Dollars per share, transferable only on the books of the Corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate of stock is entitled to interest on the par value thereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and the said Company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying to the owner hereof the par value of the part so re-

tired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

IN WITNESS WHEREOF, the said Corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation, at Spokane, Washington, this 1st day of July, A. D. 1909.

B. L. WILLIS, Pres.

[Seal] A. J. WILSON, Secy.

Shares $100 each.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

EXHIBIT "C."

Spokane, Washington.

By this SPECIAL AGREEMENT, made this first day of July, 1909, The Fidelity Lumber Company of Spokane, Washington, does hereby agree to redeem on the first day of December, 1913, Preferred Certificate of Stock dated July 1st, 1909, being Certificate No. 54 for 5 shares, by paying the Par Value of same to the holder together with all unpaid accrued interest; the surrender of said certificate with this special contract to be made to the Company at the time payment is received. But the holder of said Certificate may at his option retain the same and receive all benefits, until maturity, by surrendering this special contract to the Company for cancellation.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

EXHIBIT "E."

$348.00.

Newport, Washington, Nov. 18, 1911.

August 1st, after date for value received, we promise to pay to the order of F. F. FAVILLE at Spokane, Wash., Three Hundred Forty-eight and no/100 Dollars, with interest at the rate of 6 per cent per annum payable annually from August 1, 1911, until paid with reasonable attorney fees and statutory costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, Pres.

No. 812.

Due Aug. 1, 1912.

Exhibit—Proof of Claim of S. G. Armstrong.

[Endorsed]: No. 3009. U. S. Circuit Court of Appeals for the Ninth Circuit. Exhibit—Proof of Claim of S. G. Armstrong. Filed June 9, 1917. F. D. Monckton, Clerk.

PROOF OF CLAIM.

(Attach Itemized Statement.)

FIDELITY LUMBER COMPANY, DR.

Newport, Washington.

To S. G. ARMSTRONG,

Cedar Rapids, Iowa.

For note dated Dec. 30–11 Principal.....$ 156.00

And interest on same from Aug. 1–11 at 6%	40.00
Note dated Oct. 30–1914 Principal	2500.00
And interest on above from Oct. 30–1914 at 8%	137.00
106 shares common stock $10600 and 37 preferred $3700	14300.00
Total amount,	$17133.00

State of Iowa,
County of Linn,—ss.

S. G. Armstrong, being first duly sworn, on oath deposes and says:

That the foregoing account is a true and correct statement of the account due and owing from the Fidelity Lumber Company to the said S. G. Armstrong and that there are no offsets or counterclaims of any kind, character or description that have not been credited or offset against said account.

Dated at Cedar Rapids, Iowa, this 7th day of July, 1915.

S. G. ARMSTRONG,

Subscribed and sworn to before me this 7th day of July, 1915.

[Seal] F. W. ARMSTRONG.

Notary Public in and for Linn County, State of Iowa, Residing at Cedar Rapids, Linn County, Iowa.

Proof claim for $2611.67 allowed.

C. Ck. 10/3/16.

Received Jul. 14, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

Exhibit—Proof of Claim of M. Hakes.

[Endorsed]: No. 3009. U. S. Circuit Court of Appeals, for the Ninth Circuit. Exhibit—Proof of Claims of M. Hakes. Filed June 9, 1917. F. D. Monckton, Clerk.

PROOF OF CLAIM.

(Attach Itemized Statement.)

Fidelity Lumber Company, Dr.

Newport, Washington.

To M. HAKES, Laurens, Iowa,

For principal on 40 shares of Preferred Stock in Fidelity Lumber Co., Certificate #169, copy Exhibit "A" hereto attached	$ 4000.00
#1. Interest on same as per terms of Certificate December 2, 1911 to July 1, 1915	980.00
Interest on unpaid interest at 6% to July 1, 1915	88.20
For principal on 10 shares of Preferred Stock in Fidelity Lumber Co., Certificate #28, amount due under special contract of July 1, 1909 on which no payment has been made;	
#2. amount due December 1, 1913.....	1140.84
Interest at 6% from December 1, 1913 to July 1, 1915.....	108.34
Copy of said Certificate attached marked Exhibit "B."	
Copy of said Contract attached marked Exhibit "C."	

For principal on 7 shares of Preferred Stock in Fidelity Lumber Co., Certifi-
#2. cate #29, amount due under special contract of July 1, 1909, on which no payment has been made;

#3.	Amount due December 1, 1913....	798.59
	Interest at 6% from December 1, 1913 to July 1, 1915.....	73.03

Copy of said Certificate attached marked Exhibit "D."

Copy of said Contract attached marked Exhibit "E."

Note of Fidelity Lumber Co. dated October 24, 1914,

#4.	Due April 24, 1915. Interest 8% per annum, payable annually from October 24, 1914. Copy of note attached hereto marked Exhibit "F." Amount due August 1, 1915.....	1804.65

Note of Fidelity Lumber Co. dated December 2, 1911,

#5.	Due August 1, 1912. Interest 6% payable annually from August 1, 1911. Copy of note attached hereto marked Exhibit "G." Amount due August 1, 1915	302.76
	Interest on loan of $1700.00 from April 24, 1914, to October 24, 1914, at 8% interest	68.90

#6. Interest on said interest item since October 24, 1914 ..... 2.10

Total amount, $ 9367.41

163 shares common stock.... 16300.00

$25667.41

State of Iowa,
Pocahontas County,—ss.

M. Hakes, being first duly sworn, on oath deposes and says: That the foregoing account is a true and correct statement of the account due and owing from the Fidelity Lumber Company to the said M. Hakes, and that there are no offsets or counter claims of any kind, character or description that have not been credited or offset against said account.

Dated at Laurens, Iowa, this 28 day of August, 1915.

M. HAKES.

Subscribed and sworn to before me this 28 day of August, 1915.

[Seal] A. D. CLAUSSEN,
Notary Public in and for State of Iowa, Residing at Laurens, Iowa,

EXHIBIT "A."

Incorporated Under the Laws of the State of Washington.

No. 169. 40 Shares.

PREFERRED CERTIFICATE OF STOCK

of

FIDELITY LUMBER CO.

Capital Stock $1,000,000.00.

This Certifies that M. Hakes is the owner of 40 shares of the Preferred Stock of the FIDELITY LUMBER CO., of the par value of One Hundred Dollars per share, transferrable only on the books of the Corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate of stock is entitled to interest on the par value thereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and said Company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying to the owner hereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted

at a stockholders' meeting held January 5th, 1909.

In Witness Whereof, the said Corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation, at Spokane, Washington, this 2 day of December, 1911.

B. L. WILLIS,
President.
Secretary.
[Seal] A. J. WILSON,

Shares $100 Each.

EXHIBIT "B."

No. 28. 10 Shares.

Incorporated Under the Laws of the State of Washington.

PREFERRED CERTIFICATE OF STOCK
of
FIDELITY LUMBER CO.
Capital Stock $1,000,000.00.

This Certifies that M. Hakes is the owner of 10 shares of the Preferred Stock of the FIDELITY LUMBER CO., of the par value of One Hundred Dollars per share, transferable only on the books of the Corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate of stock is entitled to interest on the par value thereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year. The Fidelity Lumber Co. reserves the right, however, to

retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and said Company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying to the owner hereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

In Witness Whereof, the said Corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation, at Spokane, Washington, this 1st day of July, 1909.

B. L. WILLIS,
President.
A. J. WILSON,
Secretary.

[Seal]

Shares $100 Each.

EXHIBIT "C."

Spokane, Washington.

By this SPECIAL AGREEMENT, made this first day of July, 1909, the Fidelity Lumber Company of Spokane, Washington, does hereby agree to redeem on the first day of December, 1913, Preferred Certificates of Stock dated July 1st, 1909, being certificate No. 28 for 10 shares, by paying the par value of

same to holder together with all unpaid accrued interest; the surrender of said Certificate with this special contract to be made to the Company at the time payment is received. But the holder of said Certificate may at his option retain the same and receive all benefits, until maturity, by surrendering this special contract to the Company for cancellation.

FIDELITY LUMBER COMPANY.
By B. L. WILLIS,
President.

EXHIBIT "D."

No. 29 7 Shares.

Incorporated Under the Laws of the State of Washington.

PREFERRED CERTIFICATE OF STOCK
of
FIDELITY LUMBER CO.
Capital Stock $1,000,000.00.

This Certifies that M. Hakes is the owner of 7 shares of the Preferred Stock of the FIDELITY LUMBER CO., of the par value of One Hundred Dollars per share, transferable only on the books of the Corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.

The owner of this certificate of stock is entitled to interest on the par value thereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year. The Fidelity Lumber Co. reserves the right, how-

ever, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and said Company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying to the owner hereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

In Witness Whereof, the said Corporation has caused this certificate of stock to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation, at Spokane, Washington, this 1st day of July, 1909.

B. L. WILLIS,
President.

[Seal]

A. J. WILSON,
Secretary.

Shares $100 Each.

EXHIBIT "E."

Spokane, Washington.

By this SPECIAL AGREEMENT, made this first day of July, 1909, the Fidelity Lumber Company of Spokane, Washington, does hereby agree to redeem on the first day of December, 1913, Preferred Certificates of Stock dated July 1st, 1909, being Certificate No. 29 for 7 shares, by paying the par value of

same to the holder together with all unpaid accrued interest; the surrender of said Certificate with this special contract to be made to the Company at the time payment is received. But the holder of said Certificate may at his option retain the same and receive all benefits, until maturity, by surrendering this special contract to the Company for cancellation.

FIDELITY LUMBER COMPANY.
By B. L. WILLIS,
President.

EXHIBIT "F."

$1700.00 Newport, Washington, Oct. 24, 1914.

Six Months after date for value received we promise to pay to the order of M. Hakes at his office in Laurens, Iowa, Seventeen Hundred and no/100 Dollars with interest, at the rate of eight per cent per annum payable annually from date until paid with reasonable attorney fees and statutory costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, President.

No. 1403. Due April 24, 1915.
30960

EXHIBIT "G."

$240.00 Newport, Washington, Dec. 2, 1911.

August 1st after date for value received, we promise to pay to the order of M. Hakes, at Spokane, Wash. Two Hundred Forty and no/100 Dollars, with interest at the rate of six per cent per annum pay-

able annually from August 1, 1911, until paid with reasonable attorney fees and statutory costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY,
By B. L. WILLIS, President.

No. 819. Due Aug. 1, 1912.

Exhibit—Proof of Claim of Scandinavian-American Bank of Spokane.

[Endorsed]: No. 3009. U. S. Circuit Court of Appeals for the Ninth Circuit. Exhibit—Proof of Claim of Scandinavian-Amer. Bank of Spokane. Filed June 9, 1917. F. D. Monckton, Clerk.

PROOF OF CLAIM.
(Attach Itemized Statement.)

FIDELITY LUMBER COMPANY, DR.
Newport, Washington.

To Scandinavian-American Bank of Spokane, Washington, a Corporation.

For note of $5,000.00, dated July 1st, 1914, our number 8786.

Total amount, $———.

State of Washington,
County of Spokane,—ss.

O. Larson, being first duly sworn, on oath deposes and says: That he is the cashier of Scandinavian-American Bank, a corporation, and as such officer makes this affidavit for and on its behalf and states: That the foregoing account is a true and correct statement of the account due and owing from the Fidelity Lumber Company to the said Scandinavian-

American Bank, and that there are no offsets or counterclaims of any kind, character or description that have not been credited or offset against said account.

Dated at Spokane, Wash., this 30th day of June, 1915.

O. LARSON,
Cashier.

Subscribed and sworn to before me this 30th day of June, 1915.

[Seal] CLYDE JOHNSON,
Notary Public in and for State of Washington, Residing at Spokane, Wash.

Not allowed.

C. Ck. 10/21/16.

$5000.00 Newport, Washington, July 1, 1915.

Ninety days after date for value received, we promise to pay to the order of

SCANDINAVIAN-AMERICAN BANK.

At its Office in Spokane, Washington

Five thousand & no/100 Dollars with interest at the rate of 8 per cent per annum payable annually from date until paid, with reasonable attorney fees and statutory costs, if necessary for collection, waiving presentment, demand, protest and notice thereof.

FIDELITY LUMBER COMPANY.
(Signed) By B. F. MILLER,
President.

No. 8786. Due Sept. 29, 1914.

[Endorsed]: Oct. 2, 1914. Int. to Mat. 100/00. Received Jul. 30, 1915.

UNION TRUST & SAVINGS BANK,
Receiver Fidelity Lumber Co.

No. 3009

United States
Circuit Court of Appeals
For the Ninth Circuit

S. G. ARMSTRONG, F. R. CORNISH, M. HAKES, T. A. TRIMBLE, MARY E. TRIMBLE, HOMER TRIMBLE, HARRY TRIMBLE, CORA T. FAVILLE, F. F. FAVILLE, and SCANDINAVIAN AMERICAN BANK of Spokane, a corporation,

Appellants,

vs.

UNION TRUST & SAVINGS BANK, a corporation, as Receiver for Fidelity Lumber Company, a corporation,

Appellee.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Appellant's Brief and Argument

CHARLES P. LUND,
FREDERICK F. FAVILLE,
Solicitors for Appellants.

P. O. Address:
901 Old National Bank Building,
Spokane, Washington.

PETERSON & ROSS - PRINTERS - SPOKANE 3525

No. 3009

United States
Circuit Court of Appeals
For the Ninth Circuit

S. G. ARMSTRONG, F. R. CORNISH, M. HAKES, T. A. TRIMBLE, MARY E. TRIMBLE, HOMER TRIMBLE, HARRY TRIMBLE, CORA T. FAVILLE, F. F. FAVILLE, and SCANDINAVIAN AMERICAN BANK of Spokane, a corporation,

Appellants,

vs.

UNION TRUST & SAVINGS BANK, a corporation, as Receiver for Fidelity Lumber Company, a corporation,

Appellee.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Appellant's Brief and Argument

STATEMENT.

The issues involved in this case arise in the following manner:

The Fidelity Lumber Company is a corporation duly organized under the laws of the State of Washington and engaged in the wholesale lumber business.

Said company had issued its bonds which were secured by trust deed on its property and on or about the 7th day of June, 1915, the trustees holding said bonds commenced an action in the District Court of the United States for the Eastern District of Washington, Northern Division, for the purpose of foreclosing the trust deed on said property.

Certain general creditors of said corporation also commenced an action at said time and by agreement of parties and order of court the said two causes were consolidated, in equity.

By order of said court on the 7th day of June, 1915, the defendant herein, the Union Trust & Savings Bank, a corporation, was duly appointed receiver of the said Fidelity Lumber Company with full power and authority to take possession of and preserve all the property and assets of every kind and description belonging to the said Fidelity Lumber Company, to marshal the liens against said property; to ascertain all debts and obligations of said company and in general to perform all of the usual duties of a trustee in chancery.

Claims were filed with the receiver by numerous creditors of the company and the receiver filed a report in said court scheduling all the claims so filed.

The appellants herein represent one general class

of claimants. They are each holders of claims against the said Fidelity Lumber Company in the form of written obligations which are designated as "preferred stock certificates," some of which have riders or agreements on the part of the corporation thereto attached. These certificates and riders are substantially in the following form:

> "This certifies that_____ is the owner of_____shares of the preferred stock of the Fidelity Lumber Company, of the par value of one hundred dollars per share, transferable only on the books of the corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock, properly endorsed."
>
> "The owner of this certificate of stock is entitled to interest on the par value hereof at the rate of seven per cent per annum, payable semi-annually on the first days of July and January of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent thereof, and said company reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying the owner thereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stock-holders' meeting held January 5th, 1909."
>
> "For value received, the Fidelity Lumber Com-

pany hereby agrees with_____, owner of preferred certificate of stock No. _____for_____shares of the preferred stock of the Fidelity Lumber Company, to redeem said stock at par, with accrued interest, at the end of five years, from the date of said certificate, upon written request of the holder, or his assigns.

Fidelity Lumber Co.,
By A. J. Wilson, Secretary."

Some of the claimants ask for the unpaid interest on these obligations.

The receiver reported to the court on these claims and recommended that all of the same be disallowed. Objections to the report of the said receiver were filed by each of the appellants and upon final hearing the said objections were overruled and the report of the receiver was approved and the claims of these appellants were rejected and disallowed.

This appeal is from the said order of said district court in rejecting and disallowing the said claims of these appellants, and in overruling the objections to the receiver's report.

ERRORS RELIED ON.

The error relied upon in this appeal is that the decree of the district court was erroneous in holding that the appellants herein were not creditors of the Fidelity Lumber Company and entitled to participate as such in the assets of said company, and were not entitled to recover for breach of the contract of the corporation to repay the purchase price of said stock.

BRIEF.

The so-called certificates of preferred stock did not make the holders, stock-holders of the corporation but merely created the relation of debtor and creditor.

Heller vs. Nat. Marine Bank, 89 Md. 602, 73 Am. St. Rep. 212;
Elkins vs. Camden etc. Ry. Co., 36 N. J. Eq. 233;
Westchester etc. R. R. Co. vs. Jackson, 77 Pa. St. 321;
Burt vs. Rattle, 31 Ohio St. 116;
Williams vs. Parker, 136 Mass. 205;
Savannah etc. Co. vs. Silverburg, 33 S. E. 908 (Ga.);
Starrow vs. Texas Cons. etc. Asso'n, 87 Fed. Rep. 612; 10 *Cyc.* 575.

The contract between appellants and the corporation was no more than a conditional sale. There was one contract for the sale and repurchase of the stock, each object being a consideration for the other. Such a transaction is not prohibited by the statute making it unlawful for a corporation to withdraw or reduce the capital stock.

Mulford vs. Torrey Exploration Co., 45 Colo. 81, 100 Pac. 596;
Vent vs. Duluth C. & S. Co., 64 Minn. 307, 67 N. W. 70;
Browne vs. St. Paul Plow Works, 62 Minn. 90, 64 N. W. 66;
Porter vs. Plymouth G. M. Co., 29 Mont. 347, 74 Pac. 938;

Taylor vs. Miami Exp. Co., 6 Ohio 177;
Williams vs. Savage Mfg. Co., 3 Md. Ch. 418;
City Bank of Columbus vs. Bruce, 17 N. Y. 507;
Ex parte Holmes, 5 Cow. 426;
Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444;
1 *Cook on Corporations,* Sec. 313;
10 *Cyc.* 416.

ARGUMENT.

The question presented by this appeal is whether or not the written instruments as above set forth constitute the valid, legal and binding obligations of the company so that the holders thereof are creditors of the company and entitled to participate in the assets of the company as such, and entitled to recover for the breach of the contract set out.

It is appellants' contention that no matter what name was given to these written obligations, that as a matter of fact the entire contract between the corporation and the claimants created merely the relation of debtor and creditor; that the written obligations were the absolute promises of the corporation to pay the holder thereof a definite amount of money at a definite time with a fixed rate of interest thereon, the latter in no way dependent upon earnings and in no way as a dividend. The holders of the obligations were not entitled to participate in the management of the corporation in any way and no matter what name may have been given to said obligations, they were in fact the mere promises of the corporation to pay a certain amount with interest.

In determining the rights of the parties in an action of this kind there are two things which are

proper to be taken into consideration by the courts: First, what was the contract of the parties as expressed by its terms; and second, what was the intention of the parties in making the contract as shown extrinsically as throwing light upon the interpretation to be placed upon the contract?

It is our contention that these instruments taken together were the mere written obligations of the corporation. As a matter of fact, they were a mere convenient method resorted to by this corporation to borrow money, and these contracts were issued by the corporation for such loans instead of issuing negotiable promissory notes. They are merely the interest-bearing obligations of the corporation and differ little in their legal effect from promissory notes.

There are two classes of claimants holding this preferred stock. One class holds certificates to which a so-called rider or special agreement to repurchase was attached at the time; the other class holds certificates in the same form but without any such agreement to repurchase. The lower court considered the two instruments as one contract, and we shall so discuss them.

The primary question is whether the holders of the written instruments are mere stock-holders of

the company, or whether by the terms of this contract with the company they are creditors thereof and entitled to participate for breach of contract in the distribution of the assets of the company with the other creditors.

It is our contention that by the terms of the contract between the parties the holders of these obligations are creditors of the company the same as the holder of any other interest-bearing bond or other obligation of the corporation.

In many instances the courts have been called upon to determine the legal status of holders of corporation indebtedness that are called "certificates of stock."

Each case must necessarily turn upon its own facts. No two cases are exactly alike, and hence precedents are not as valuable in such a case as they might otherwise be.

The real question for determination is the true interpretation to be placed upon the particular contracts under discussion. Certain general rules, and certain collateral matters, as, for instance, the manner in which the corporation has treated the obligations, are of assistance in determining the proper construction to be placed upon the written instrument.

There are at least three things which we may

take into consideration in determining the proper construction of these contracts. They are:

(1) The language of the instruments themselves.

(2) The resolution of the corporation under which the instruments were issued.

(3) The use to which the company put the instruments and the manner in which the company recognized them.

The so-called "certificate" and the collateral agreement must, of course, be construed together, for they constitute the contract between the parties. They are as follows:

> "This certifies that_____ is the owner of_____shares of the preferred stock of the Fidelity Lumber Company, of the par value of one hundred dollars per share, transferable only on the books of the corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly endorsed.
>
> The owner of this certificate of stock is entitled to interest on the par value hereof at the rate of seven per cent per annum, payable semi-annually on the first days of July and January of each year. The Fidelity Lumber Company reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium

of five per cent thereof, and said company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying the owner thereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5th, 1909.

For value received, the Fidelity Lumber Company hereby agrees with_____owner of preferred certificate of stock No._____ for_____shares of the preferred stock of the Fidelity Lumber Company, to redeem said stock at par, with acrued interest, at the end of five years from the date of said certificate, upon written request of the holder or his assigns.

Fidelity Lumber Company,
By A. J. Wilson, Secretary."

In the first place, it is to be noticed that the *name* which the corporation may have given the written instrument is not determinative of its legal character.

Whether these instruments were designated "certificates of stock," "interest-bearing obligations," "guaranteed redeemable obligations," or by some other name, their legal effect must be determined from what they in fact *are*, and not what they are *called*.

In *Heller vs. National Marine Bank,* 89 Md. 602, 73 Am. St. Rep. 212, a case involving the rights of holders of so-called "preferred stock," it is said:

> "The mere naming of it does not make it that which it is named, if in fact it is something else. Its properties and qualities determine what it

> is. * * * * Calling stock, 'preferred stock,' does not per se define the rights in such stock but these depend on the statute or contract under which it was issued. Elkins vs. Camden etc. Ry. Co., 36 N. J. Eq. 233."

The court further says:

> "Courts are not influenced by mere names, they look beyond these and give the subject dealt with, the character, the status which its properties denote it possesses. The qualities and properties of a thing are its essential, they define and mark what it is, the name is purely accidental and is no part of the thing named. * * * * If it possesses characteristics and qualities that are entirely foreign to preferred stock, as strictly defined, and are descriptive of something else, then the thing is obviously either not ordinary preferred stock or not preferred stock at all even though it be called preferred stock, and have in addition to its own qualities some of the characteristics that do pertain to preferred stock."

It is well said in the case of *Burt vs. Rattle*, 31 Ohio St. 116:

> "If we can understand the word 'dividend' in the sense of interest, and the word 'stock' in the sense of debt, so that 'certificate of stock' will mean 'certificate of indebtedness' and 'preferred stock-holder' mean 'preferred creditors or preferred certificate holders' there is no trouble in so interpreting the act and making all its provisions harmonious and constitutional."

Again in the cited case it is said:

> "The question in such cases is not what did the parties call it, but what do the facts and circumstances require the court to call it."

Applying these rules to the instruments in question, we find that while called "certificates of stock" they are, as a matter of fact, the absolute and unqualified promises of the corporation to pay a certain definite principal sum, at a certain definite and fixed time, and to pay a certain, definite and fixed rate of interest thereon, at certain periods, until the principal becomes due and is paid. While lacking negotiability in the ordinary sense of that term, they meet every other essential of promissory notes in being "unqualified written promises to pay a certain sum in money at a definite time and at a fixed rate of interest."

One very essential and striking characteristic which of itself distinguishes these instruments from certificates of stock is that they provide for the payment of *interest* on the face of these certificates at the rate of 7 per cent per annum, payable semi-annually. This alone makes these certificates unique and peculiar and distinguishes them essentially from the common run of preferred stock certificates. It is to be noted that the certificate makes no provision about the payment of *"dividends"* or about any preference to the extent of 7 per cent in "dividends." The certificates do *not* provide that the holder is to have a preference over other stock-holders in the *"earnings"* of the corporation. Nothing of the kind

can be claimed for the language used, for it clearly and unmistakably declares that "this instrument bears *interest* at 7 per cent per annum, payable semi-annually." If the corporation did not earn one dollar this interest would still be due and payable. It has no relation whatever to the earnings, profits or dividends. It is intentionally designated as "interest."

It will be observed that it is not as some of the cases where a certain per cent is to be paid "if earned" or "out of dividends" or "from earnings" or "out of profits." It is an absolute, unconditional promise to pay as *"interest"* a certain per cent.

If this were an ordinary certificate of stock we take it that it would be void as against public policy for the corporation to provide by contract with its stock-holders, as stock-holders, that they should receive a fixed and definite amount whether there were any earnings out of which the same could be paid or not.

It is one thing for a corporation to agree with its *creditors* that it will give its written obligations to pay interest on a certain sum at a fixed rate, but it is a different thing for the corporation to agree with its *stock-holders* that it will declare and pay them dividends to a certain amount whether the same are earned or not.

If this was stock in the ordinary use of the term then the contract was illegal on the face of it as requiring the corporation to pay on stock a certain dividend whether any dividend at all was earned or not.

On the other hand, if this contract is construed as we contend it should be, then it is perfectly legitimate and binding on the corporation. It is merely a method adopted by this company to borrow money and agree to pay to the lender a certain fixed interest thereon, and it was wholly immaterial to the creditor whether the company acquired any profits or could declare any dividends.

The holder of this obligation was entitled to his interest, as interest, whether the company was prosperous or not and utterly regardless of whether there were any profits or earnings to be divided.

It therefore follows that the first primary and essential characteristic of stock is utterly wanting in these instruments, while on the contrary they are the legal and valid interest-bearing obligations of the corporation.

In *Westchester etc. Ry. Co. vs. Jackson, 77* Pa. St. 321, the statute under which the stock was issued provided that the holders thereof would be entitled to receive a "dividend" of 8 per cent per annum upon stock, payable semi-annually. The court held:

> "The payment for his shares by Mr. Gray and the issuing of certificates to him by the defendant made as complete a contract as if he had been the purchaser of bonds instead of a subscriber for stock. * * * * A corporation may issue new shares and give them a preference as a mode of borrowing money, where it has power to borrow on bonds and mortgages, as preferred stock is only a form of mortgage."

Attention is also called to the fact that the so-called preferred stock was not intended to form a permanent part of the capital of the corporation, for provisions were made for its redemption, exactly as in the case at bar, and the court held that the holder of this so-called preferred stock was a creditor of the company.

It seems to us that this case is strikingly analagous to the situation in the case at bar. True, in that case the certificate provided for a "dividend" which the court construed to be interest, and exactly as in the case at bar the court held that the scheme of the corporation was merely a mode of borrowing money and that the issuance of the so-called certificates of preferred stock was only a form of mortgage.

Exactly as in the case at bar provision was made for the final redemption by the corporation of the certificates at their face value, and so, in the case at bar, the corporation expressly agreed "to redeem said stock at par with accrued interest at the end of five

years from the date of said certificate upon written request of the holder or his assigns." Therefore we have an interest-bearing written obligation providing for the payment of interest, as interest, whether earned or not, and providing absolutely that the company may pay the principal in full at its option at any time after five years, and that at the request of the holder it must pay the principal with accrued interest at the end of five years. What other or different is this than a written obligation of the corporation bearing interest and payable at a certain date?

In *Williams vs. Parker,* 136 Mass. 205, the stock contained a guarantee that the holder should receive "semi-annual dividends" of a *fixed* amount. The court held that this provision for semi-annual dividends was in legal effect an absolute promise to pay this amount semi-annually whether there were dividends out of which it could be declared and paid or not, and held that if it became necessary, the holder of this certificate could require the payment of this semi-annual amount in effect as interest out of the property of the company. So in the case at bar, it seems to us no one can question that the holder of these certificates, at any interest paying date, could have maintained an action against the company for the interest then due, and it would have

been no defense whatever to such an action that the company had not earned any dividends out of which to pay said interest. If this promise of the company could have been so enforced then it seems to us that the conclusion is inevitable that the contract was a debt, compelling and requiring the company to pay its obligations utterly regardless of whether it was earning any profits. If this be true, then the instrument is not stock, and no matter what it is called, it is nothing more than the enforceable obligation of the company, or, in other words, nothing more nor less than evidence of a debt.

In the case of *Burt vs. Rattle,* 31 Ohio St. 116, there is a very similar state of facts to the case at bar. In that case the certificate provided that the company would guarantee semi-annual dividends at a rate of 4 per cent per annum and guaranteed the final payment of the face value of the obligation on a certain date. The obligation was described and designated as "preferred stock." The case is practically on all fours with the case at bar, with the exception that "dividends" were to be paid, while in the case at bar the company was to pay "interest." So that the instant case is a stronger one on the theory of the certificate being the debt of the corporation, than is the cited case. The Ohio court refers to the holders of these certificates, saying:

> "They have no right to vote or to take any part in the possession or control of the concern. They gain nothing by its success and lose nothing by its failure. They have no participation in either its profits or losses. * * * * A man who advances his money to a corporation and takes a bond and mortgage for its re-payment and who by express agreement between the parties takes no risk or interest in the concerns of the company, is a creditor of the company, and to call him a stock-holder is a simple misnomer. He is a creditor and remains a creditor until by some future act of his own he elects to become a stock-holder or otherwise changes his relation. The right to become a stock-holder does not make the possessor a stock-holder."

This is especially true of the instant case. The holders of these certificates had no right to vote or to take any part in the possession or control of the concern. They gained nothing whatever by its success and lost nothing by its failure. They were entitled to their interest, no more and no less. Whether the company was prosperous or operated at a loss was wholly immaterial to them. They got their 7 per cent interest semi-annually in *any* event. As the Ohio court says, they took no risk or interest in the concerns of the company, and simply were entitled to draw interest on the principal of the obligation when the same became due, and such a party is a creditor of the company and to call him a stock-holder is a simple misnomer."

Again, the case of *Savannah etc. Co. vs. Silverberg,*

33 S. E. Rep. 908, is so very closely in point as to the facts and the issues involved that we especially call the court's attention to it.

The certificates were almost identical in form with those in the case at bar. They provided that the holder should receive a "dividend" of 8 per cent per annum. The holder was denied the right to take part in stock-holders' meetings and the contract provided that the stock should be retired at a certain date. In every essential particular the stock was of the same kind as that in the case at bar. The court held that the resolution authorizing the issuing of the stock should be taken into consideration with the certificate in determining the construction to be placed upon it. The court discusses the various propositions as to the withholding of the right to vote, the use of the word "dividend," the fact that the issue was to be retired, and the other matters shown in the certificate. In every essential the case is identical with the case at bar, and the court concludes:

> "Looking at the substance of the contract now under investigation, our final conclusion is that the relation of lender and borrower arose between the parties and that the paper issued at the time the money was advanced, although in its form it appears to be a certificate of stock, is, in fact and in substance, simply an evidence of indebtedness which the holder has a right to enforce against the person executing it."

It will be noticed that in the cited case the certificate provided that the holder should receive a "dividend," and again we call the court's attention to the fact that there is no reference whatever to a dividend in the case at bar. These certificates provide for *interest* and nothing else. In the cited case provision was also made that the stock should be retired at a certain date, exactly as in the case at bar. As the Georgia court declared, it is essential to look at the substance of the contract and not merely at the designation that is given the instrument, and that as a matter of fact the so-called certificate is simply an evidence of indebtedness, bearing a fixed rate of interest and requiring unconditionally its absolute payment on a certain fixed date.

The case of *Starrow vs. Texas Cons. Compress & Mfg. Asson'*, 87 Fed. Rep. 612, involves a discussion of the question of preferred stock. In this case the certificates provided for a guaranteed dividend of 6 per cent "to be paid only out of the net earnings of said association." It will be observed at once that this very materially differs from the certificate in the case at bar because it provides not for the payment of a certain definite amount as interest in any event, but expressly provides that the dividend is to be paid only out of net earnings. In discussing the case the court says (page 616):

> "The preferred stock-holder has no vote or voice in the management of the corporation. He possessed none of the rights of a common stock-holder as such, and about the only difference between him and the ordinary lender of money was that he was not to receive his interest unless there were sufficient net profits to pay the same. Therefore so far as the face value of the preferred stock is concerned, it is in the nature of a debt against the corporation and the interest thereon becomes a debt as soon as it can be shown that there were profits wherewith to pay it, and becomes a lien prior to the rights of the holders of common stock upon the net earnings if there were such, for the amount of the dividend, and can be followed wherever invested by the company."

Now applying this rule to the facts in the case at bar, it seems to us there can be no escape from the proposition that the holders of these certificates of preferred stock were creditors of the company and were in effect mere "ordinary lenders of money."

In the cited case it is held that they would be such creditors if they were to receive interest in *any* event regardless of net profits. That is precisely the contention we are making in the instant case. The certificates of stock on their face do not call for the payment of a dividend or interest "*if* the same was earned," but as we have heretofore pointed out, require the company to pay a definite amount of interest, as interest, utterly regardless of earnings. The rule recognized in the cited case is especially applica-

ble to the case at bar and the reasoning therein, it seems to us, is conclusive on the proposition that under the terms of the contract in the instant case, the relation of debtor and creditor was created by these certificates.

We can see no good reason why the holdings of these courts should not be followed in the instant case.

Undoubtedly in the great majority of instances where preferred stock is issued the holder thereof is a stock-holder and not a creditor. Many instances have arisen in which the question has been discussed regarding the rights of the holders of such stock as against the holders of common stock. Such cases can be of no assistance in the determination of the proposition involved in this case.

Each case must be decided according to its own facts and the authorities we have cited show the holdings of the courts in cases so nearly analagous to the case at bar as to be most persuasive in the determination of this question.

II.

But we are not limited in determining this matter merely to the language of the written instruments. As we have heretofore demonstrated, in and of them-

selves these instruments on their face show that they create the relation of debtor and creditor and not the relation of a stock-holder to the corporation.

Our position in this regard is enforced and corroborated by the resolution adopted by the corporation authorizing the issuance of this so-called stock, or, in other words, creating the loan.

The resolution not only authorizes the issuance of the written instruments in the form set forth above but provides that the company should *"guarantee"* the payment of the interest thereon. This is conceded in the stipulated facts in this case. (Transcript page 41.)

So that the corporation in authorizing this loan and the issuance of these evidences of debt made no mistake as to what it was doing. It did not intend to issue stock that should have a preference in dividends or earnings, but it provided for the issuance of these obligations and that it should "guarantee" a payment of interest at the rate of seven per cent per annum thereon.

So that the company advisedly provided for the issuance of these written instruments guaranteeing the payment of interest regardless of earnings and expressly providing for the repayment of the loan at a certain date.

Under such a situation it is well said in 10 Cyc. 575:

> "The sound view plainly is that where the corporation guarantees, as is sometimes the case, not only interest on the stock, but also agrees to receive back or otherwise liquidate the principal of the shares at par, at a date named, then the certificates become substantially an interest-bearing bond of the corporation and the holder of it becomes to *the fullest extent a creditor,* although he may also have rights pertaining to a shareholder, such as the right to vote at corporate meetings. It has been pointed out that under some schemes what has been called 'preferred stock' is really an interest-bearing debenture of the corporation, which creates the relation of debtor and creditor between the corporation and the so-called share-holder."

This clearly is a "sound view" and is one that "plainly" applies to the case at bar. We come under the precise situation described in the text quoted. In the instant case the corporation "guarantees not only its stock but also agrees to receive back or otherwise liquidate the principal of the shares at par, at a date named," and as is said in the text, under such circumstances *"the holder becomes to the fullest extent a creditor."* Such an obligation creates the relation of debtor and creditor "to the fullest extent."

Numerous cases can be found holding to the general proposition that "a holder of preferred stock is not a creditor of a corporation." Generally and broadly speaking, that is true, and we are not disputing such a proposition. But the important and distinguishing point we are urging is, that by the terms of *this* contract, the claimants were not pre-

ferred stock-holders at all. The whole matter of distinction in the cases turns upon the construction of the *particular* contract. If by the contract the relation of debtor and creditor was created, then we have the rights of a creditor, and can not, and should not be deprived of these rights, under a general rule that ordinarily the holder of preferred stock is not a creditor. But we have yet to find the case holding that where a corporation issues its written obligations bearing a fixed rate of interest which it "guarantees" to pay, utterly regardless of earnings or dividends, and expressly agreeing to repay the face of the obligation on a certain date, that the holder of such an obligation is not a creditor.

The case of *Spencer vs. Smith,* 201 Fed. Rep. 647, referred to in the opinion of the learned District Judge and which no doubt will be relied upon by counsel for appellee, does not controvert our position in the least. The court announces the general proposition that holders of preferred stock are not corporate creditors. We concede this proposition. It is held that the certificates in that case made the holders thereof stock-holders and not creditors, but there is a very clear distinction between the instruments in that case and the ones in the case at bar. In that case the instruments possessed the most essential and pronounced characteristics of stock, namely,

that they were "entitled to cumulative *dividends* of ten (10) per cent per annum payable quarterly, commencing April 1st, 1906, *from the net profits* of the corporation *before any dividends are paid on the common stock,* and the common stock is entitled to all dividends in excess of said ten (10) per cent." Who would claim that this created the relation of debtor and creditor? The holder was to participate in *dividends* if dividends happened to be earned. But in our case the corporation bound itself to pay *interest as interest,* whether anything was earned or not. This one thing makes the cases clearly and plainly distinguishable.

In the one case, the holder, like every other stock-holder, was merely to be preferred to a certain extent in dividends if dividends were earned. Like any other stock-holder he had to await the earning of dividends before anything was due him. In our case, however, the relation of debtor and creditor was absolutely fixed from the very start. If the corporation had not paid the interest it agreed to pay when an installment became due, an action could have been maintained *at once* to recover it. Would it have been any defense that no *dividend* had been earned out of which to pay it? By no means.

In the Spencer case, however, no action could have

been maintained except for participation as a stockholder in properly earned dividends. In the Spencer case the contract as construed by the court provided "if thereafter the corporation made profits, the holder of any preferred stock would receive dividends; and, if at any time the corporation was dissolved and its assets were distributed, the preferred stock would be preferred as against the common stock."

Undoubtedly this made the holder merely a holder of preferred stock and not a creditor. But how different is the situation in the case at bar, when the relation of debtor and creditor was created the instant the instruments were issued under a guarantee to pay seven per cent interest in *any* event.

Furthermore, it is to be noted that while this instrument declares that the holder owns "shares of the preferred stock of the Fidelity Lumber Company," it *nowhere,* by express statement or even intimation suggests, wherein, how, over whom, or what, it has any preference. It makes *no* reference to the common stock. It does not say, as in the great number of cases, including the Spencer case, that it is to be preferred by being entitled to dividends from the net profits "before any dividends are paid to the common stock." If it did, *then* it would of course be preferred stock,—a stock with a preference over other stock, in dividends *if* dividends were earned.

In the instant case it is of no little significance that a so-called "preferred stock," by no contract, resolution or otherwise, makes any preference whatever to the thing over which it is to be preferred or the manner in which that so-called "preference" is to be secured.

As has been well said: "Calling such a contract as this 'preferred stock' is a mere misnomer."

As well might the corporation have denominated it a dozen different things as to have called it "preferred stock" and then created no preference over anybody or anything by the contract.

It did nothing more nor less than issue its paper due in five years and bearing seven per cent interest and call it "preferred stock" instead of calling it by its true name.

If any case can be found holding that a contract with terms of this kind, either in language or legal effect, makes the holder a stock-holder and not a creditor of the corporation, we must confess we have been unable to discover it. We do not believe any such case can be found.

III.

Again, in considering and determining the true interpretation to be placed upon the contract in ques-

tion we should take into consideration the manner in which the parties themselves treated it.

If this contract was a mere certificate of preferred stock and is ambiguous in not disclosing wherein the preference lies or over whom the holder has a preference, we ought to get some light on this question by ascertaining how the parties themselves treated it.

For example, if the company made profits and declared dividends and the holders of this stock were given a preference in these dividends and received and accepted the same, it would furnish us very valuable data from which to determine the true character of the contract as intended and as construed by the parties themselves.

But let us see what in fact happened. * * * There is no pretense that this company ever declared any dividends in any way, shape, manner or form, and there is no claim that the holders of these certificates participated in any such dividends to the extent of 7 per cent or any other amount.

On the contrary, it affirmatively appears from the agreed facts in the record (Transcript page 44) *"that as to a large amount of this preferred stock, interest was in fact paid at the rate specified in that certificate and at the time fixed in the certificate, and without reference to the fact as to whether the company*

had earned dividends out of which the same could be paid and was in fact so paid." In other words, this company and the holders of these certificates treated this obligation as being exactly the thing it was, namely, the interest-bearing indebtedness of the corporation, and at the time fixed in the certificate, to-wit: twice a year, without any reference whatever as to whether the corporation had earned any dividends at all or not, this interest was paid. Why was it paid? Because a stock-holder was having preference over other stock-holders in a dividend which had been earned or declared? By no means. It was being paid *as interest* because the company had borrowed this money from the holder of this paper, and had agreed to pay him interest on it, and because the *interest* was then due. If he was a stock-holder could he have demanded such payment?

It seems to us that it is exceedingly significant that from the time of the issuance of these certificates and while this company was a going concern, without any claim whatever that it earned a dollar of dividends, or that these so-called stock-holders had a preference in dividends over other stock-holders, the company continued to pay the interest which these contracts called for seasonably.

Certainly the parties themselves, both the corporation and the stock-holders, understood and construed

this contract as creating the relation of debtor and creditor from its inception and throughout acted in accordance with such understanding.

Can it now be said that the receiver of this company is in a position to ask the court to construe this contract other and different than its own terms plainly provide, and as the parties themselves have construed it and acted upon it during a long period of time? It is elementary law, requiring no citation of authorities, that where a contract is doubtful it will be construed by the court where possible in the manner in which the parties to it have acted upon and construed it.

That is exactly what we are asking the court to do in this case, and the agreement which the parties themselves made and which they carried out in good faith on both sides and construed and acted upon, without doubt or question while the company was in existence, should, we submit, be fulfilled and carried out by the court under the existing condition.

Another significant thing that we call the court's attention to in regard to this so-called stock is that the corporation not only issued it for money actually turned over to the company, but actually used it to pay for property purchased by the corporation. The corporation bought certain timber claims and paid

therefor part in cash and part in these certificates of stock with the agreement attached to "redeem" the same at a certain time and pay interest at a certain rate in the meantime. The corporation paid the interest at the times stated regularly, without reference to the earnings of the company, and finally issued its promissory note, running for ninety days more time, in payment of the original obligation evidenced by the certificate of stock.

What more significant fact could there be as to how the parties understood and treated the contract? The corporation used these certificates exactly the same as their promissory notes and issued them in payment of property which it purchased. After keeping up the interest, when the obligation became due according to its terms, the corporation took up this paper and got a ninety days' extension and issued its note for the debt. (Transcript pages 48, 49 and 111.)

What clearer evidence could there be of how the parties construed and understood the contract than this transaction?

Corporations do not thus deal with preferred stock. But the transaction was a proper and legitimate one in the purchase of property and the issuance of an interest-bearing obligation therefor.

Again, as fortifying our position, we call the court's attention to the fact that not only did the corporation pay the interest on these certificates in most intsances as it became due, but carried out the collateral contract and paid off the obligations as they matured.

It is stipulated of record (Transcript page 44) "that of the issue of stock (referring to these certificates) about $60,000 was in fact paid for in full by the company with the interest on it."

This is of vast significance in helping us to determine the intention of the parties and the manner in which they construed this contract. Not only in issuing them and in paying interest on them but as well in paying them off at maturity, did the corporation treat these obligations as being nothing other or different than debts of the corporation. It appears that before the receiver was appointed the holders of $60,000 of these certificates had been paid as the collateral contracts provided. We are only asking that as to these remaining creditors the same contract be carried out. That these claimants were less fortunate than others in not getting their money does not deprive them of the right under their contracts to now receive the amounts due them. Until the receiver was appointed the corporation never hinted at any claim that these certificates were not the debts of the corporation. The corporation was issuing

them for borrowed money and in payment of property purchased. It was paying the interest thereon as it became due. It was to a very great extent paying off these obligations as they matured. No one had any thought that the contract was other or different than its terms expressed and as the parties treated it. We are merely asking the court to construe the agreement as the parties themselves construed it, and to direct the receiver to act as the corporation itself acted on these obligations. It is both legal and equitable that these claimants should be placed in the same position as other creditors holding similar obligations have been placed.

IV.

It was the view of the trial court that the agreement on the part of the corporation to repay the amount received by it for these certificates was illegal and void. Even if so, the certificates without such agreement are merely debts. The theory is that if these certificates are nothing but certificates of stock in the capital stock of the corporation, that then an agreement by the corporation to repurchase the same would be illegal under the statutes of the State of Washington. We do not admit that such a result would necessarily follow under such circumstances under the laws of that State, but let us, for the sake

of argument only, admit for the moment that such result would follow. If it be true, as a matter of law, that such a result would follow, then we contend this fact, of itself, sustains our claim as to the construction that should be placed upon the contracts. It certainly is not to be presumed that the corporation undertook to do an illegal thing. If there is doubt in the matter, the courts will construe the contract as legal rather than illegal, if it is capable of such construction. This is hornbook law. If to call these obligations "stock" makes the contract illegal, then the corporation has committed a "legal fraud" upon these claimants, for it has taken their money under a promise to repay it, which promise it is now said is void, simply and solely because the obligations are "stock." If, on the other hand, these obligations are contracts or debts of the corporation, then they are perfectly legal and the corporation had a perfect right to enter into them and carry them out. Presumptions are to be indulged in favor of the legality of the transaction. If doubtful, the contract is to be construed as valid and not as illegal and void. The fact that these claimants will be deprived of their right to recover on a contract under which the other party has received the full benefit, should of itself cause the court to construe the instruments as legal if they are capable of such construction.

So that we submit if it be true that the contention of the receiver results in construing these instruments as non-enforceable, that very fact should cause the court to place upon them that construction, if possible, which would uphold them, and carry out the intent of the parties.

The question of the alleged illegality of the contracts was not placed in issue by the receiver either in his report as the ground for disallowance of appellants' claims, or otherwise. We think that there should have been such an issue tendered if it is to be urged.

However, as we have suggested above, the fact that such a claim is or can be made, in and of itself sustains our contention is to the manner in which the contracts should be construed.

Again, we respectfully urge upon the court that even if the statutes of the State of Washington (Transcript page 63) provide that it shall be unlawful for the trustees of a corporation to in any way pay stock-holders any part of the capital stock of the corporation or reduce the capital stock of the company except in the manner provided by law, that still under the undisputed facts in this case, the statute would have no application whatever in this case, and could not be urged by the receiver to defeat the rights of these claimants.

In connection with this proposition we desire to call the court's attention to the case of *Mulford vs. Torrey Exploration Co.,* 45 Colo. 81, 100 Pac. Rep. 596. This is a very well considered case and the argument therein is especially applicable to the situation in the case at bar. It sustains our contention fully and supports our position by reasoning and precedents.

In that case the plaintiff sued to recover on a contract by which the corporation agreed with him to repurchase certain shares of stock from the plaintiff. It appears that the contract for repurchase, exactly as in the case at bar, was executed contemporaneously with the issuance of the stock. There was no question in the cited case but that the instruments held by the plaintiff were certificates of stock in the corporation, and exactly as in the case at bar, the question arose on the breach of the contract made with the corporation at the time to redeem and pay for this stock. The statute of the State of Colorado on this subject is even stronger than the statute of the State of Washington. It is clear and concise and is quoted in the cited case. The Supreme Court of Colorado said, referring to this matter:

> "The statute upon which the defense is based, to the effect that the contract in question are in violation of the statutes of the state, is as follows: 'It shall not be lawful for such corpora-

> tions to use any of their funds for the purchase of stock in their own company or corporation, except such as may be forfeited for the non-payment of assessments thereon, except as hereinafter provided.' Section 485, 1 Mills' Ann. St. This statute does not apply. The company desired to sell its treasury stock. It received the consideration agreed upon therefor. The plaintiff only purchased upon the condition that he should have the right to return the stock, and have the consideration which he gave therefor returned to him. There was but one contract, namely, for the sale and repurchase of the stock; each object being a consideration for the other. The sale was therefore conditional. Such a transaction is not prohibited by the statute. If, however, it could be successfully contended that the contracts in question are *ultra vires*, then the defendant can not escape liability thereon for the reason that, where a corporation reaps and retains the fruits of an act which is merely unauthorized, it will not be permitted to interpose the defense of *ultra vires*."

This, it seems to us, is conclusive on the proposition involved in the instant case. The statute referred to does not apply to such a situation at all. Exactly as in the cited case the company desired to sell its stock (assuming that the instruments herein are certificates of stock). These appellants only purchased upon the condition that they should have the right to return the stock and have the consideration which they gave therefor returned to them. There was but one contract, namely, for the sale and repurchase of stock; each object being consideration for

the other. The sale was therefore conditional and not prohibited by the statute.

If, however, it could be successfully contended that such a contract was *ultra vires,* then the corporation can *not* escape liability for the reason that where a corporation reaps and retains the fruits of an act which is merely unauthorized, it will not be permitted to interpose the defense of *ultra vires.*

In this discussion we are assuming for the sake of argument only, that this issue is properly before the court and that the claimants are "stock-holders," and even if so, we most respectfully urge that under well recognized rules of law, such a contract as was made with these appellants in the instant case was perfectly valid and enforceable. If this was stock that was sold, it was sold under a written agreement as a part of the consideration made at the time of its issuance, that the corporation would take the stock back and repay the purchase price if demanded by the holder. The stock was properly tendered back and repayment demanded. (Transcript page 92.)

Under the authorities universally recognized, and which we believe can in no respect be disputed, such a transaction *is perfectly valid and the corporation can not accept the money and then repudiate its portion of the contract under the claim of ultra vires.*

And certainly if the corporation itself can not repudiate the contract, the receiver can not do so.

The cases cited by the Supreme Court in the *Mulford* case fully sustain the position we take.

In *Vent vs. Duluth C. & S. Co.,* 64 Minn. 307, 67 N. W. 70, the Supreme Court of the State of Minnesota, in conisdering such a contract for the repurchase of stock which was claimed to be *ultra vires,* said:

> "This provision of the contract constituted a material and substantial part of the consideration and inducement for the purchase of stock by plaintiff and if the purchase is void it seems to us that it vitiates the whole contract and is a sufficient reason for the recission of that contract and the return of the purchase price, which purchase price plaintiffs are demanding. But the better opinion, it seems to us, is, that which holds the original contract to be a conditional sale with the option to revoke and rescind in the purchaser."

It will be noticed in the case at bar that the agreement for the repurchase of the stock provides that it is to be "upon the written request of the holder or his assigns." (Transcript page 62.) Therefore, it was "a conditional sale with the *option* to revoke or rescind in the purchaser."

The case of *Porter vs. Plymouth Gold Mining Company,* 29 Mont. 347, 74 Pac. 938, is a very well considered case and covers the proposition involved in

the case at bar. In that case a contract was entered into between the plaintiff and the corporation whereby the corporation agreed to sell to the plaintiff certain shares of its corporate stock for an agreed price and agreed to repurchase the same at the expiration of six months, if the plaintiff so desired. The court held that there was but one contract, namely, for the sale and repurchase of the stock, each object being the consideration for the other. The court said:

> "This contract was entire and indivisible. The sale could not be sustained unless the contract of repurchase could be enforced. Therefore, if a portion of the contract is *ultra vires,* the *whole contract* must fall. The corporation can not be heard to say that the sale was valid and the contract to repurchase was void without rescinding the sale and returning the purchase money, thus placing the other party in statu quo ante. The appellants have executed the contract of purchase on their part by the payment of the purchase price. The corporation therefore has received from them something of value, which it would not have received except for its contract of repurchase. It can not be heard to say: 'True, I have received your two thousand dollars, which I promised to return to you upon the happening of certain events, but my promise in that regard was and is beyond my power to enter into, and, although the contemplated events have occurred, I will keep your money and will not perform my contract.' Such action, if allowed, would be reproach upon the law. It is not honest or right, and right is the basic principle of all law."

It was claimed in that case that the statutes of the State of Montana, as is here claimed for the statutes of the State of Washington, prohibited the reduction of the capital stock of the corporation except in a certain manner. The effect of the two statutes appears to be idetnical.

Commenting on this question, the Supreme Court of Montana said:

> "Would the capital stock of the company have been reduced in violation of Section 438 of the Civil Code by the purchase of this stock? Section 438 of the Civil Code provides as follows: 'Directors of corporations must not * * * * reduce or increase the capital stock except as hereinafter specially provided.' The mere repurchase of this stock would not tend to decrease the capital stock of the company unless the directors should absolutely merge or extinguish the stock after its repurchase. The company could own and deal with it just the same as it had done before the sale. It could be sold and issued again. The company would be in no different position as to this stock than it would have been had the transaction with appellants in regard to it never occurred. When it is transferred to the company, it becomes a part of its property. It is there for the creditors and stockholders. The capital stock is not decreased. A portion of the capital of the company may be unavailable until the stock is again sold and issued, but nothing is destroyed. Whether the stock is merged or extinguished or held as an asset for sale is much a matter of intention on the part of the corporation. If it is unlawful to decrease the capital stock, presumptively the directors did not violate the law. It would re-

> quire some positive showing to the contrary to overturn this presumption. The following authorities lend sufficient support to this position: 1 Cook on Corporations, Sec. 313; Taylor v. Miami Exp. Co., 6 Ohio 177; City Bank of Columbus v. Bruce, 17 N. Y. 507; Williams v. Savage Mfg. Co., 3 Md. Ch. 418; Ex-parte Holmes, 5 Cow. 426; State v. Smith, 48 Ct. 266; Morgan v. Lewis, 36 Ohio St. 1, 17 N. E. 558; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444."

It seems to us that the argument in this case is absolutely in point in the instant case and that it is unanswerable. The statute of the State of Washington does not prohibit such a contract as the corporation entered into in the instant case. As is so plainly said by the Supreme Court of Montana, "the mere repurchase of the stock would not tend to decrease the capital stock of the company, unless the directors should absolutely merge or extinguish the stock after its repurchase." "The company would be in no different position as to this stock than it would have been had the trasaction with appellants in regard to it never occurred." "When it is transferred to the company it becomes a part of its property. It is there for the creditors and stock-holders." "Whether the stock is merged or extinguished or held as an asset for sale is much a matter of intention on the part of the corporation. *If it is unlawful to decrease the capital stock, presumptively the directors*

did not violate the law. It would require some positive showing to the contrary to overcome this presumption." It seems to us that comment can not add to the clear announcements of the court in dealing with a situation identical with that in the case at bar, under a statute of the same import. The reasoning is conclusive. This statute of Washington does not in any way prevent the carrying out of this contract.

We therefore submit to the court that the action of the trial court in denying the claims of these appellants should be reversed, and that a mandate should issue requiring the receiver to pay the several claims of these appellants based on said certificates of stock.

Respectfuly submitted,

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United States
Circuit Court of Appeals
For The Ninth Circuit

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Appellants,

vs.

UNION TRUST & SAVINGS BANK, a corporation, as Receiver for Fidelity Lumber Company, a corporation,

Appellee.

No. 3009.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Appellee's Brief and Argument

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STATEMENT.

We desire to make one or two comments upon appellants' statement of the case.

The certificates of preferred stock, so called, which are involved in this case, in addition to that portion

quoted in appellants' statement, Page 3, contained the following heading:

"No. 250 ----------Shares

Incorporated under the Laws of the State of Washington

Preferred Certificate of Stock

of

Fidelity Lumber Co.

Capital Stock $1,000,000."

These certificates of stock, as we shall call them, naturally group themselves into three classes and although appellants have discussed the law as applicable generally to the three classes, we believe a clear distinction can and should be made between each class. They are as follows:

1st. Certificates of stock in the form set out at pages 41 and 42 of the transcript, to which no rider or redemption agreement whatsoever was attached; that is to say, the corporation issuing the stock at no time agreed to redeem the same at any definite date.

2nd. Certificates of stock, to which *after issuance* a rider or agreement was attached promising redemption by a certain date. Typical of this form of rider is the one set forth at page 43 of the Transcript. (For examples of this class see Transcript Pgs. 22, 25, 26 and 27, etc.)

3rd. Certificates of stock which *at the time of issuance* had attached thereto a rider similar in form to that above referred to.

ARGUMENT.

A careful reading of appellants' very thorough brief convinces us that they have considered this case on a fundamentally wrong theory; that is to say, they have endeavored to test the rights of the holders of these certificates as *against the corporation* issuing them, without respect to the rights of the *creditors* of that corporation.

This misconception runs through the entire brief; but that the rights of the holders of these certificates should be determined not as against the corporation, but as against the creditors of that corporation represented in this litigation by the Receiver, we think will become apparent from even a casual reading of the cases hereinafter cited.

Appellants are asserting rights against an insolvent corporation in the hands of a Receiver. This Receiver in so far as the present case is concerned, is here representing the creditors and the report and recommendation which the Receiver made to the learned trial court were made not on behalf of the Fidelity Lumber Company, but in the interest of the general creditors, whose undisputed claims would be seriously impaired were the rights of the appellants finally upheld.

Appellants have likewise overlooked this same distinction which the trial court points out in his memorandum opinion, from which we quote:

> "While, therefore, the contracts embodied in the certificates and riders are valid as between stock-holders and as against the corporation, they are void as to creditors, and all obligations of every kind and character arising out of them must be postponed until the claims of general creditors have been satisfied in full." (Trans., Pg. 64.)

We respectfully submit that if a discussion of this case is approached with this distinction clearly in mind, many of the cases cited by appellants as authorities, will quickly be seen to be *not* antagonistic to the position taken by the trial court.

We come then to the consideration of the principal question; as to whether or not the holders of the so-called preferred stock are creditors or stock-holders of the Fidelity Lumber Company.

ELEMENTS OF THE CONTRACT.

In determining this question the court will look to the governing statute, to the resolution under which the preferred shares were issued, to the Articles of Incorporation, to the recitals in the share certificates, and to the riders attached thereto, inasmuch as all these elements enter into and form a part of the contract.

10 *Cyc.* 575;
Spencer vs. Smith, 201 Fed. 647-650.

WEIGHT TO BE GIVEN TO THE DESIGNATION OF THE INSTRUMENT.

While it is true that the court will look to the contract itself to determine whether the holder is a stockholder or creditor, still considerable weight must be given to the designation actually employed by the parties in describing the instrument in question.

Miller vs. Ratterman, 47 Ohio State 141;
Sc. 24 N. E. 496.

In this case the court recognizes the rule that the designation given to the certificate by the parties is not controlling, but said:

> "However, what the parties in a given case have called the subject of the contract is of no little significance in determining their purpose, and when that purpose is certain it is of much importance in giving construction to the contract."

Likewise, in Spencer vs. Smith, *supra.,* the Circuit Court of Appeals for the Eighth Circuit, said:

> "What the parties to a contract may call it, of course, is not binding upon the courts if it is clearly something else. Still in arriving at the intention of the parties we may look to the language which they used in reducing their contract to writing. In the articles of incorporation, in the stock itself, and in the mortgage the stock in controversy is called 'preferred stock'."

THE DESIGNATION AND CHARACTERISTICS OF THE CERTIFICATES IN QUESTION ARE THAT OF STOCK.

We direct the court's attention to the following characteristics and designation in the resolution authorizing the issuance of this stock and in the stock itself, which to our mind characterize it as stock and not as certificates of indebtedness.

1st. By the resolution of the stockholders passed January 25th, 1909 (Trans., Pg. 40), the capital stock of the company was increased from $500,000.00 to $1,000,000.00, of which $200,000.00 was to be preferred stock. The Articles of Incorporation of the company were amended accordingly, so that the increase of capital stock was to be effected by the issuance of $300,000.00 common stock and $200,000.00 *preferred.*

It must be borne in mind that the stock here in controversy is part of the $200,000.00 preferred referred to in this resolution and part of the increased capital of the corporation authorized thereby.

2nd. The resolution repeatedly refers to these certificates as "preferred stock".

3rd. It should be particularly noted that the resolution authorizing the issuance of this stock provides in effect that if the company has been delinquent in the payment of interest for a period of one year, the holder shall be entitled to participate in the conduct of the affairs of the company "in the same manner as the owner of common stock therein".

4th. In the certificate itself are contained all the earmarks of capital stock. In the heading, "Incorporated under the laws of the State of Washington, preferred certificate of stock of Fidelity Lumber Company, capital stock $1,000,000.00" are words which indicate as plainly as words can do, that the certificate represents part of the capital stock. More than this, the certificate is in the usual and customary form of a certificate of stock, outside of the fact that dividends are designated as interest, which circumstance we will comment upon hereafter.

In the view of appellants, these certificates were "a mere convenient method resorted to by this corporation to borrow money and these contracts were issued by the corporation for such loans instead of issuing negotiable promissory notes. They are merely the interest bearing obligations of the corporation and differ little in their legal effect from promissory notes." (Brief, p. 8.)

In making this statement we believe that appellants have entirely overlooked the history and origin of these certificates, and in this connection we call the court's attention to a circumstance of great importance as showing that it was the intention of the corporation to issue stock and not merely a money obligation.

In 1907, the Board of Trustees of the company passed a resolution authorizing an issue of $250,000.00 of *preferred certificates of indebtedness.* These certificates were to bear interest at 7% per annum, payable semi-annually, to run for six years and expressly stip-

ulated that the holders thereof should not be stockholders, but should be creditors. They also provided that the company should have the option of substituting for these certificates of indebtedness, *preferred stock* of the company, with like terms of payment and like conditions. (Trans., Pgs. 39 and 40.)

The preferred stock here in controversy was issued upon the surrender of the preferred certificates of indebtedness, referred to in that resolution.

In the meantime the capital stock of the company had been increased and authority granted for issuing $200,000.00 in preferred stock.

If the preferred stock was never more than a mere money obligation, as counsel for appellants seem to think, then did not the company do a very vain and useless thing when it substituted preferred stock for the preferred certificates of indebtedness? On the other hand, does not the very fact that preferred certificates of indebtedness were first issued, expressly stipulating that the holder should be a creditor and not a stockholder, and that these certificates of indebtedness were later converted into preferred stock, point almost conclusively to the conclusion that both the company itself and the persons with whom it was dealing, understood that they were receiving stock, and not a mere money obligation? Else why the change?

Appellants have urged at considerable length that the company and the holders of these certificates, both dealt with them as certificates of indebtedness, and not as

certificates of stock, and that inasmuch as the construction which the parties themselves placed upon the contract is of great weight, this should impel the court to hold that the owners of these certificates are creditors and not stockholders.

Here again we find the fundamental error into which appellants have fallen in trying to test these certificates without reference to the rights of creditors. Under the trust fund doctrine of the capital stock of a corporation, which is now almost universally accepted, there are three parties concerned with a corporation's capital stock;—the stockholder, the company and the company's creditors. Hence it must be apparent that even if the company here and the holders of these certificates did in fact construe them to be certificates of indebtedness (which we emphatically deny) still such construction certainly would not be binding upon the other party to the contract, to-wit:—the company's creditors.

But as above indicated, the fact that the company issued this preferred stock in substitution and exchange for certificates of indebtedness, shows that the parties did not regard the certificates in question as mere certificates of indebtedness Again the fact that the right to vote was granted after the company became delinquent one year upon these certificates, is important, because surely even the average man must understand that the only thing that is voted in a company is stock, and that mere money obligations of a corporation do not carry with them the right to vote.

LEGAL STATUS OF THE CERTIFICATES IN QUESTION.

We believe that the court will find no difficulty in deciding that these certificates were certificates of stock.

The only question then which remains is whether or not the promise on the part of the Fidelity Lumber Company to redeem this stock at a certain date, which was attached to the certificates in the form of a rider, gave to the holder not only the rights of a stockholder, but also those of a creditor of the company.

We have made a very thorough examination of the authorities and while a few of the earlier cases were inclined to hold that certificates similar to those involved in this case, and with promises of redemption at a certain date, were certificates of indebtedness and not stock, yet we believe that all of the recent cases and to our mind the best considered cases support the position of the trial court.

We submit that the reasoning in these cases is unanswerable and will appeal to your Honors.

One of the leading cases on the subject and one referred to in nearly all of the decisions, is the case of

Hamlin vs. Toledo S. T. & K. C. R. Co., 78 Fed. 664,

decided in 1897.

The opinion in this case was written by Judge Lurton and concurred in by Judge Taft. We ask the court to read this case. The pith of the decision may be

gathered from the following quotation from the opinion:

> "If the purpose of providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby."

Rider vs. John G. Delker & Sons Co., 140 S. W. 1011 (Ky.)
Sc. 39 L. R. A. Ns. 1007,
decided in 1911.

In this case the preferred stock contained a provision giving the holder the right to have his certificate redeemed at any time after five years by giving six months previous notice. The plaintiff brought suit upon five shares of this stock to recover the par value, alleging that the notice required by the Articles of Incorporation and the terms of the stock itself had been given. The case clearly raises the question as to whether or not the holder was a stockholder or creditor of the company. The court in holding that the certificates constituted the holder a stockholder and not a creditor, said:

> "The capital of the corporation is the sum total of its stock, whether common or preferred. Certificates of stock are mere evidences that the holders thereof have invested the sums called for in the certificates in the enterprise. They run the risk of losing their stock if the business is not a success. As between themselves and third persons who deal with the corporation and give it credit, their stock is equally liable. It is only in cases

> where the corporation is solvent and the rights of creditors not injuriously affected thereby that agreements as to preference among themselves, may be enforced. The entire capital, without regard to any arrangement which may exist between common and preferred stockholders, is at all times subjcet to and liable for the debts of the corporation, and no part of the capital can be withdrawn from the business until the debts of the corporation are satisfied."

Warren vs. Queen, 87 Atl. 595 (Pa.), decided in 1913.

This was an action brought to recover upon a certificate of preferred stock which after guaranteeing the payment of 8% dividends annually out of the earnings of the company contained the following stipulation:

> "The shares represented by this certificate shall be redeemed by the company on March 1st, 1911, at par."

The question therefore was clearly raised as to whether the stock constituted the holder a creditor or stockholder. The court, after holding that the certificate in form and substance evidenced the ownership of fifty shares of preferred stock and could not be construed to be a contract for the payment of money, said:

> "It would be against public policy to permit a preferred stockholder to assert his claim as such against the funds of a corporation in preference to the claims of creditors. The stock of a corporation is its capital, and is responsive to the claims of its creditors. It is held in trust for the payment of the indebtedness of the corporation. The relation of a stockholder and a creditor of a cor-

poration is not at all alike, but entirely different. A certificate of stock does not make the holder a creditor as well as a stockholder. A stockholder cannot be both a creditor and a debtor by virtue of his ownership of stock. The stock is part of the capital of the corporation which the holder cannot withdraw until its indebtedness is paid. * *

A corporation has no right to make any rules by which the holder of stock, common or preferred, may be preferred in the liquidation of its assets over the creditors of the company."

Inscho vs. Mid-Continent Development Co., 146 Pac. 1014 (Kan.),

decided in 1915.

In this case the stock was preferred as to dividends and assets upon a winding up of the company's affairs. It was not entitled to vote and was redeemable at the option of the company after one year from date of issue. The Company through its Board of Directors passed a resolution exercising its option to redeem the stock in question and obligated itself to redeem the same. Thereafter the holder of the stock brought suit to recover its par value, etc. The court after a very full review of the authorities held that the certificates were stock and not certificates of indebtedness. The court carefully distinguishes the older cases cited in 10 Cyc. 574.

Warren vs. King, 108 U. S. 389;
Sc. 27 L. Ed. 769.

The Supreme Court of the United States in construing a certificate of preferred stock containing a stipulation that same should be a lien upon the assets

of the company after the indebtedness held that the holder was a stockholder and not a creditor.

Spencer vs. Smith, 201 Fed. 647,
decided in 1912.

This case, decided by the Circuit Court of Appeals for the Eighth Circuit, reverses a case sometimes referred to in support of the contrary doctrine, namely: *In re* 50 Gold Mines Corporation, 190 Fed. 105. The certificate involved in this case contained the following stipulation:

> "Said corporation expressly agrees to redeem all its preferred stock on or before January 1st, 1916."

In addition, the company executed a deed of trust or mortgage to secure the payment of dividends, and the redemption of the stock as stipulated. The court held that this was not a certificate of indebtedness but constituted the owner a stockholder of the company. We ask the court to read this case. We do not believe that appellants have distinguished this case from the one at bar. It is stronger if anything, in that the company executed a trust deed or mortgage expressly guaranteeing the redemption of the stock and we believe that this court, as did the trial court, will find that the differences between the certificates here in controversy and the certificates of stock in the Spencer case, are slight and unimportant.

For a very general discussion of this proposition see subject "Corporations", 7 R. C. L. Sec. 171. Thompson on Corporations, 2nd Ed., Vol. 4, Sect. 3607.

Appellants urge very earnestly that Sections 3677 and 3697, R. & B. Anno. Codes and Statutes, referred to in the opinion of the trial court, have no application to the situation in this case. For the court's convenience we quote Sect. 3697 R. & B. Codes:

> "It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company, unless in the manner prescribed in this chapter, or the Articles of Incorporation or by-laws. * * *"

The position of appellants as we understand it is that the issuance of this stock with the rider attached, promising redemption by a certain date, was no more nor less than the sale of the stock with a contemporaneous agreement on the part of the company to repurchase the same at a certain time, and cases are cited by appellants to the effect that as between the company and a stockholder buying under such an agreement for repurchase, the transaction is not within the inhibition of such a statute as we have quoted above.

Again we say that appellants have overlooked the distinction which obtains where the rights of creditors are involved

The cases cited by appellants are all cases between corporations and a stockholder, and the courts are very careful to point out that a different rule obtains where the rights of creditors are affected. As illustrative of

this distinction, see

> *Schulte vs. Boulevard Gardens Land Co.,* 164 Cal. 464; Sc. 129 Pac. 582; Sc. 44 L. R. A. NS. 156.

The case cited involved the construction of a contract executed in connection with the issuance of certain stock whereby the corporation in effect promised to repurchase the stock upon ninety days' notice. After holding that the contract did not violate the provision of the California Code, very similar to that in force in Washington quoted above, the court said:

> "All that has been said is subject to the qualification that the rights of creditors are not to be affected by the arrangement between the purchasers of stock and the corporation. No doubt a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscriptions be made applicable to the satisfaction of the corporate debts. In most of the cases cited by respondent the courts were dealing with states of facts in which the rights of creditors were involved. But no such question arises here; the complaint alleging that the assets of the corporation are greatly in excess of its indebtedness."

This corporation has held itself out to the world as a company possessed of a capital stock of $1,000,000.00. It issued these certificates under the designation of stock and as part of its capital of $1,000,000.00. The holder was entitled to vote after one year's delinquency in the payment of interest. Doubtless also the holder was entitled to participate in the profits, if any, of the company. To permit the holders of this stock to withdraw the par value thereof to the injury of creditors,

is to permit the holders to practice a constructive fraud upon those who have dealt with the company on the faith of its having a capital of $1,000,000.00. It seems to us that the riders attached to this stock promising redemption on a certain date are therefore contrary to public policy and void, and that the holders of this stock are in no sense creditors, and can only share in the assets of the corporation after the creditors of the company have been paid in full.

Appellants urge that because the certificates in question promise the payment of interest, that that determines their status as money obligations. We might very well suggest the rule referred to by counsel that what parties term a thing does not necessarily determine its legal status. Whether it be termed interest or dividends, the guarantee of the company to pay the same irrespective of the earnings of the corporation would be illegal as against creditors. As between the company and the holder of the certificate the guarantee might be enforcable.

Viewed from the standpoint of the rights of creditors in this case, the holders of the certificates in question were clearly stockholders under the authorities which we have cited, and if they are to be regarded as creditors in any sense, their rights as suggested by the learned trial court must be postponed until the ordinary obligations of the company have been liquidated.

The judgment should be affirmed.

Respectfully submitted,

HAMBLEN & GILBERT,

Solicitors for Appellee.